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# National Journal of Comparative Law

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# DISABLED PERSONS AND HUMAN RIGHTS IN INDIA

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## ABSTRACT

India, being a welfare state has got the obligation to help the downtrodden as well as the disadvantageous people of the society. Persons with disability also falls within that criteria, as such they need some attention and help from the state. Persons with disabilities do not mean persons with no quality, rather they may be more able than the other persons. In fact, this matter is taken care of by the society as well as the legal system of the country and the result of which is that the persons with disabilities are no more called so, but they are called '**differently able persons**' now. The welfare of the persons with disabilities has achieved a multi- dimensional meaning since times immemorial. On one hand, it stands for providing equal opportunities in life through legal rights while on the other hand, to provide financial aids, free educational facilities and vocational training for their rehabilitation and uplift. Thus, in order to grasp a clear cut idea about the rights and status of persons with disabilities in India and the welfare measures available for them, it is important to discuss about the human rights concept of disability as prevailed in India.Therefore, in this paper I'll critically study the human rights perspective of the persons with disabilities in India and will mainly focus on the effective steps for the protection of their rights and status in our country.

**Key Words :** Differently Able Persons, Disadvantageous People, Human Rights, Obligation, Persons With Disabilities, Rehabilitation, Welfare State Etc..

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## INTRODUCTION

Over 600 million people, or approximately 10 per cent of the world's population, have a disability of one form or another. Over two thirds of them live in developing countries. Only 2 per cent of disabled children in the developing

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world receive any education or rehabilitation. By all accounts, India is home to the largest number of persons with disability in the world. The 2001 census of the country estimated their number at 22 million. However the actual number of people with temporary and permanent disability could be as high as 50 million.[3]

The link between disability and poverty and social exclusion is direct and strong throughout the world. The dominant social attitude towards persons with disability has been one of pity, from which springs insidious forms of discrimination – the eventual source of their exclusion and extreme isolation. They lead dispersed social lives that make their discrimination appear as individual problems. Although the Constitution of India prohibits discrimination on grounds of religion, race, caste, sex or place of birth according to Article 15 the arrangements necessary to translate the constitutional guarantees into reality have been conspicuously absent till recently. [4]

A dramatic shift [5] in perspective has taken place over the past two decades from an approach motivated by charity towards the disabled to one based on rights. In essence, the human rights perspective on disability means viewing people with disabilities as subjects and not as objects. It entails moving away from viewing people with disabilities as problems and instead locating problems outside the disabled person and addressing the manner in which various economic and social processes should accommodate the difference of disability.

The past decade has also witnessed an unprecedented process of change that has positioned disability in the centre of a debate that focuses on the idea of 'society for all'. The disability rights debate is about ensuring the equal effective enjoyment of all human rights, without discrimination, by people with disabilities. It is inspired by the values that underpin human rights: the inestimable dignity of each and every human being, the concept of autonomy or self-determination that demands that the person be placed at the centre of all decisions affecting him/her, the inherent equality of all regardless of difference, and the ethic of solidarity that requires society to sustain the freedom of the person with appropriate social supports. [6]

Essentially a democratic State must concern itself with issues of equity and justice implying that the defense of human rights is indistinguishable from the defense of democracy that is inclusive in character and respectful of difference. The human rights approach to disability has led to the evolution of an impressive legal framework and positive jurisprudence that has clarified the content of rights in the context of disability. This is best exemplified by the United Nations Standard Rules on the Equalization of Opportunities for People with Disabilities, adopted by the General Assembly in resolution 48/96

[3] Disability and Human Rights by Shubhangi, available on *http://jurisonline.in/?p=5008, last visited on dated 25.10.2013 at about 7 P.M.*.

[4] *Id.*

[5] *Ibid.*

[6] *Id.*

of 20 December 1993. Recent research shows that 39 States in all parts of the world have adopted non-discrimination or equal opportunity legislation in the context of disability. The Constitution of India also guarantees persons with disabilities the full range of civil, political, economic, cultural and social rights. Under the belief "*Isolated injustices need no longer be experienced in isolation*" many NGOs are increasingly approaching disability as a mainstream human rights issue. [7]

## DISABILITY: MEANING AND DEFINITION

Disability is an umbrella term, covering impairments, activity limitations, and participation restrictions. An impairment is a problem in body function or structure; an activity limitation is a difficulty encountered by an individual in executing a task or action; while a participation restriction is a problem experienced by an individual in involvement in life situations. Thus disability is a complex phenomenon, reflecting an interaction between features of a person's body and features of the society in which he or she lives. [8]

A **disability** [9] may be physical, cognitive, mental, sensory, emotional, developmental or some combination of these. What a society at a particular time in its history considers to be a disabling conditioning reflects its conception of a normal and socially functional human being; and hence in a way it reflects society's self image. The recognition of a physical and mental condition as disabling by a society is also a tacit acceptance by it of its responsibility towards people considered disabled.

Recent times have contributed to a process away from negative definitions of disability as indicating abnormality and impairment to a positive definition that first and foremost asserts essential humanness, understood around notions of human rights and community life, of the disabled that they share with all others, and then within this shared framework identifies special features that make disabled people different from others. The formal notion of disability has undergone revisions to accommodate changes in social norms and attitudes. [10]

### Medical Definition of Disability[11]

A number of definitions in use consider disability as individual pathology: – a condition grounded in the physiological, biological and intellectual impairment of an individual.

The World Health Organization (WHO) in 1976, provided a three-fold definition of impairment, disability and handicap explaining that 'an impairment is any loss or abnormality of psychological, physiological or anatomical structure or function; a disability is any restriction or lack (resulting from an impairment) of ability to perform an activity in the manner or within the range considered normal for a human being; a handicap is a disadvantage for a given individual, resulting from an impairment or a disability, that prevents the fulfillment of a role

7 *Id.*
8 *Ibid.*
9 *Id.*
10 *Id.*
11 *Id.*

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that is considered normal (depending on age, sex, social and cultural factors) for that individual.' Such a description frames disability within a medical model, identifying people with disabilities as ill, different from their non-disabled peers and unable to take charge of their own lives.

However, the diagnostic parameters of a medical definition do not take note of the imperfections and deficiencies in the basic social structures and processes that fail to accommodate the difference on account of disabilities.

### Social Definition of Disability[12]

The change in understanding of disability from an individual pathology to a social construct is best reflected in the way UN Standard Rules on the Equalization of Opportunities for Persons with Disabilities, 1993 define disability. According to these rules 'people may be disabled by physical, intellectual or sensory impairment, medical conditions or mental illness.' Such impairments, conditions or illnesses may be permanent or transitory in nature. A handicap is considered a loss or limitation of opportunities to take part in community life on an equal level with others. The purpose of this distinction is to emphasize the focus on the shortcomings in the environment and in many organized activities in society that handicap a disabled person.

Thus, it can be concluded that Standard Rules have defined disability from a perspective that emphasizes social conditions which disable a group of individuals by ignoring their needs of accessing opportunities in a manner conducive to their circumstances.

### Human Rights Definition of Disability[13]

The definition of disability adopted by the British Council also takes into account the social conditions which disable a group of individuals by ignoring their needs of accessing opportunities in a manner different from others. However, it also views these social conditions as infringing upon human rights of disabled and as instances of discrimination against them.

According to this definition, 'disability is the disadvantage or restriction of activity caused by a society which takes little or no account of people who have impairments and thus excludes them from mainstream activities.' Therefore, like racism or sexism, disability is described as a consequence of discrimination and disregard to the unique circumstances of people with disabilities.

## HUMAN RIGHTS OF PERSONS WITH DISABILITIES AT THE INTERNATIONAL LEVEL

An international-level awareness pertaining to the rights of persons with disabilities started in 1969 with adoption of the Declaration on Social Progress and Development by the UN General Assembly. [14]

In 1971, the General Assembly adopted the Declaration on the Rights of Mentally Retarded Persons, which stipulates that mentally challenged persons are accorded the same rights as

[12] *Ibid.*

[13] *Id.*

[14] Disability Law vis-à-Vis Human Rights by Justice S.B. Sinha, Cite as : (2005) 3 SCC (J) 1, available on *http://www.ebc-india.com/lawyer/articles/2005_3_1.htm, last visited on dated 25.06.2014 at about 10 P.M.*.

other human beings and some special rights corresponding to their needs in medical, educational and social fields. Whenever a mentally challenged person is unable, because of the severity of his or her handicap, to exercise all his rights in a meaningful way or it should become necessary to restrict or deny some or all of these rights, the procedure adopted for that restriction or denial of rights must contain proper legal safeguards against every form of abuse. In 1975, the General Assembly adopted the Declaration on the Rights of Persons with Disabilities, which proclaimed the civil and political rights of PWDs. Then in 1976, the General Assembly declared that the year 1981 will be the International Year of PWDs and called for a plan for action at all levels & outcome of this was the formulation of the World Programme of Action Concerning PWDs, adopted by the General Assembly in December 1982. For implementing the activities recommended in the World Programme of Action, the General Assembly proclaimed 1983 to 1992 as the *United Nations Decade of Disabled Persons*. [15]

On the basis of experience gained during the Decade of Disabled Persons (1983-92), the General Assembly adopted the Standard Rules on the Equalization of Opportunities for Persons with Disabilities in its 85th Plenary Meeting on 20th December 1993. Although the Standard Rules are not compulsory, the purpose of the Rules was to emphasise the responsibility of States in removing obstacles that prevent persons with disabilities from exercising their rights and freedoms.[16]

Contemporary international thinking is of the view that disability is the result of interaction between societal barriers and the impairment rather than a product of the limitation imposed by physical or mental impairment. Accordingly, the disability policy of Belgium focuses on education, social integration, greater independence and improvement of the living conditions of the PWDs, whereas that of Spain concentrates on social integration through an action plan. Similarly, the interests of PWDs in Austria is defended by the Federal Ministry of Labour, Health and Social Affairs as a matter of social policy rather than as a matter of social legislation, while in Netherlands the Vocational (Re)integration of People Act seeks vocational rehabilitation of people with a disability. The British Parliament has preferred to enact the Disability Discrimination Act, 1995 that prevents discrimination against the PWDs in matters of employment, provision of goods, facilities and services, education, public transport (including taxis, public services vehicles and rail vehicles), and establishes a National Disability Council. The United States has also chosen to enact the Americans with Disabilities Act, 1990 (ADA) based on the finding that "historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem".[17]

Some of the most important provisions relating to the human rights of the disabled at the international level can be summarized as follows:

15 *Id.*
16 *Ibid.*
17 *Id.*

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## Fundamental Human Rights of Persons With Disabilities[18]

The United Nations *Charter* affirms the essentiality of "a universal respect for, and observance of, human rights and fundamental freedoms for all without distinction...".

The rights of individuals with disabilities are grounded in a human rights framework based on the United Nations *Charter*, the Universal Declaration of Human Rights, international covenants on human rights and related human rights instruments.

Persons with disabilities are entitled to exercise their civil, political, social, economic and cultural rights on an equal basis with others under all the international treaties. The full participation of persons with disabilities benefits society as their individual contributions enrich all spheres of life and this is an integral part of individual's and society's well-being and progress for a society for all - with or without disabilities. The rights of individuals with disabilities have been addressed more generally throughout the development of the international human rights law. The principle of the right to equality, addressed throughout the normative standards set out by the international human rights instruments is the foundation of the rights of individuals with disabilities. In order that the rights of persons with disabilities may be further realized, contemporary international law has increasingly recognized the need for all states to incorporate human rights standards into their national legislation. Although the means chosen to promote full realization of economic, social and cultural rights of persons with disabilities may differ among countries, there is no country exempt from the need for improved policies and laws for individuals with disabilities.

## b) International Norms and Standards Relating To The Rights of Persons With Disabilities[19]

The international human rights instruments address the rights of individuals with disabilities both generally and specifically. There are a number of specific international human rights instruments, which would contribute to the promotion of the human rights of persons with disabilities. Examples of such instruments are: the Convention on the Elimination of All Forms of Discrimination against Women; the Convention against Torture and other Cruel, Inhumane, or Degrading Treatment or Punishment and the Convention on the Rights of the Child.

Research has indicated that the consequences of disablement are particularly serious for women. Women with disabilities are discriminated against on two grounds: gender and disability, and often they have less access to essential services such as health care, education and vocational rehabilitation. General Recommendation 18 by the Committee on the Elimination of All Forms of Discrimination against Women specifically deals with the issue of women with disabilities. The optional protocol to the Convention on the Elimination of All Forms of Discrimination against Women, which was adopted by the General Assembly in 1999, may also provide an important venue to specifical-

[18] Human Rights and Persons with Disabilities, available on *http://www.un.org/esa/socdev/enable/rights/humanrights.htm, last visited on dated 17.06.2014 at about 5 P.M.*.

[19] *Id.*

ly address the issues concerning women with disabilities.

Disability often arises from war and inhumane treatment. The Convention Against Torture and other Cruel, Inhumane, or Degrading Treatment or Punishment may be utilized to ensure that appropriate state action be taken for those who have become disabled as a result of inhumane treatment as well as to promote prevention.

The Convention on the Rights of the Child is an example of a human rights instrument that specifically and generally addresses the rights of children with disabilities. The Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict and on the sale of children, child prostitution and child pornography is also relevant to children with disabilities.

In addition to the general international human rights instruments, disability-specific instruments concerning the rights of persons with disabilities have been adopted at the international level. Unlike the aforementioned international legal instruments, these instruments are declarations, resolutions and normative guidelines adopted by the United Nations General Assembly that are not legally binding. These include the Declaration on the Rights of Mentally Retarded Persons, the Declaration on the Rights of Disabled Persons, the World Programme of Action concerning Disabled Persons, the Tallinn Guidelines for Action on Human Resources Development in the Field of Disability, the Principles for the Protection of Persons with Mental Illness and the Standard Rules on the Equalization of Opportunities for Persons with Disabilities.

### c) Historical Overview of Policy Development at the International Level [20]

In the 1940s and 1950s, the United Nations focused on promoting the rights of persons with physical disabilities through a range of social welfare approaches. In the 1960s, initiatives within the disability community, coupled with the adoption of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, resulted in a fundamental reevaluation of the rights of individuals with disabilities within disability policies.

In the 1970s, the growing international concern with human rights for persons with disabilities was specifically addressed by the General Assembly in the Declaration on the Rights of Mentally Retarded Persons, the Declaration on the Rights of Disabled Persons and by proclaiming 1981 as the International Year for Disabled Persons.

The human rights of persons with disabilities became an important part of the international policy agenda in the 1980s. The World Programme of Action concerning Disabled Persons was adopted by the General Assembly at its thirty-seventh session in 1982. The World Programme of Action is a comprehensive global strategy that utilizes "equalization of opportunities" as its guiding principle for the achievement of full participation of persons with disabilities, on the basis of equality, in all aspects of social and economic life and development. The World Programme transformed the disability issue from a

[20] *Ibid.*

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"*social welfare*" issue to that of integrating the human rights of persons with disabilities in all aspects of development processes.

Also in the early 1980s, the Sub-commission on Prevention of Discrimination and Protection of Minorities (currently the Sub-commission on Prevention of Discrimination and Protection of Human Rights) appointed Mr. Leandro Despouy of Argentina as Special Rapporteur to study the connection between human rights, violations of fundamental human freedoms and disability which resulted in his final report, "*Human Rights and Disabled Persons*."

Mr. Despouy's report, a benchmark in the field of human rights and disability, provided a comprehensive framework for the promotion of the human rights of persons with disabilities. The report recognized that in order for the human rights of persons with disabilities to be realized, there must be further development in jurisprudence within the human rights mechanisms and institutions at international and at domestic levels and an increased effort to adjudicate the rights of persons with disabilities at a national level. The available data suggests that many recommendations submitted by Mr. Despouy in his report remain to be substantiated by the international community.

In the 1990s, as a significant outcome of the United Nations Decade of Disabled Persons(1983-1992) the Standard Rules on the Equalization of Opportunities for Persons with Disabilities were adopted by the forty-eighth session of the General Assembly in 1993. The Standard Rules are an international instrument with a human rights perspective for disability-sensitive policy design and evaluation as well as for technical and economic cooperation.

### d) Recent Developments Concerning The Broad Human Rights Framework To Promote The Rights of Persons With Disabilities[21]

The United Nations conducted a comprehensive comparative study of global disability policies and programmes in 1997, issued as a Report of the Secretary-General, "Review and appraisal of implementation of the World Programme of Action concerning Disabled Persons." This study indicated that a broad human rights framework must be further developed and established for disability policies and programmes to promote social, economic and cultural rights as well as the civil and political rights of persons with disabilities. Major international conferences and summits that were organized during the first half of the 1990s on a range of development agendas adopted action plans and programmes in which participation, inclusion and improved well being of persons with disabilities were accorded a special emphasis. The study further indicated that in order for the rights of persons with disabilities to be recognized, a broad human rights framework, drawing upon the considerable body of international norms and standards in the social, economic, civil, cultural and political fields is needed. This framework does not simply benefit persons with disabilities but also contributes to the advancement of the rights of all persons in society.

Most recently, the fifty-sixth session of the Commission on Human Rights adopted resolution 2000/51 of 25 April 2000, entitled "*Human Rights of Persons with Disabilities.*" The resolution invites treaty bodies and their Special Rapporteurs to include

[21] *Ibid.*

the rights of persons with disabilities in the monitoring of the implementation of the relevant human rights instruments. The resolution also urges Governments to include the question of human rights of persons with disabilities in their reporting requirements under the existing human rights treaties and calls for co-operation with the Special Rapporteur on Disability of the Commission for Social Development and the High Commissioner for Human Rights to examine possible measures to strengthen the protection and monitoring of the human rights of persons with disabilities. [22]

## DISABILITY, HUMAN RIGHTS AND THE INDIAN INITIATIVE

India is a signatory to the Proclamation on the Full Participation and Equality of People with Disabilities in the Asian and the Pacific Region, which was adopted at the meeting to launch the Asian and Pacific Decade of PWDs (1993-2002) convened by the Economic and Social Commission for Asia and Pacific at Beijing on 1st December, 1992. To implement the Proclamation, the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (the Act) was enacted with effect from 1st January, 1996. [23]

The Constitution of India does not specifically prescribe discrimination on the ground of "disability", but it does contain non-discriminatory provisions that guarantee equality and equal opportunities for all citizens as in Article 14 and Article 16. It not only guarantees right to life and personal liberty but also directs the State through Article 41 to make effective provisions for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and in other cases of undeserved want, in consonance with the complementary principles of "non-discrimination" and "reasonable differentiation". Further, the judiciary has played a commendable role over the years in transcribing the principles articulated in the Constitution and other laws into reality. [24]

In addition to the constitutional guarantees and the Act, other legislation such as the Mental Health Act, 1987, the Rehabilitation Council of India (RCI) Act, 1992 and the National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999 have a bearing on the protection and development of persons with disabilities. Besides, the Juvenile Justice (Care and Protection of Children) Act, 2000, which facilitates, amongst other things, the integration of persons with disabilities into mainstream society, there are beneficial labour legislations such as the Workmen's Compensation Act, 1923, the Employees' State Insurance Act, 1948 and the Public Liability Insurance Act, 1991, which protect and promote the rights of persons disabled during the course of employment. [25]

### The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995[26]

The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 ("The Act") treats disability as a civil right rather than a health and welfare issue, and recognises the need to integrate persons with disa-

[22] *Ibid.*
[23] *Supra Note 16*
[24] *Id.*

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bilities with the mainstream of society by some normative action considering that even by conservative estimates the number of PWDs in the country now number over 90 million according to the survey conducted by NSSO in 1991. Moreover, the survey revealed that in States such as Andhra Pradesh, Himachal Pradesh, Karnataka, Madhya Pradesh, Orissa and Tamil Nadu, the ratio of people with disabilities was higher than the national average of 19 PWDs in every 1000 persons. With the inclusion of the PWDs as a specific category in the 2001 census, the figures are now expected to increase manifold.

The definition of disability has now shifted throughout the world from a medical problem to a social disability. This is recognised by the British Parliament in the Disabilities Discrimination Act, 1995 as well as by ADA. However, the Indian Legislature has not yet accepted this change and disability as defined in Section 2(i) of the Act still accepts the problem only as a medical disability.

One may usefully define disability as "... the loss or limitation of opportunities that prevents people who have impairments from taking part in the normal life of the community on an equal level with others due to physical and social barriers".

Among other things, the Act intends to provide for the responsibility of the State towards the prevention of disabilities, protection of rights, provision of medical care, education, training, employment and rehabilitation of persons with disabilities; to create a barrier-free environment for persons with disabilities; to remove any discrimination against persons with disabilities in the sharing of development benefits vis-...-vis non-disabled persons, etc. It also establishes a simple, inexpensive, and speedy mechanism for the redress of grievances. For example in India, State Commissions have been set up and there also exists a National Commission for Persons with Disabilities in Delhi.

In *Javed Abidi v. Union of India*,[27] while directing Indian Airlines to provide concessions for passengers suffering from locomotor disability, the Supreme Court held that the true spirit and object of the Act is to create a barrier-free environment for PWDs and to make special provisions for the integration of persons with disabilities into the social mainstream.

In *Indian Banks' Assn. v. Devkala Consultancy Service,* [28] while ruling that the banks were indeed at fault for excessively charging Rs 723.79 crores annually from borrowers by way of resorting to rounding up of the rate of interest, the Supreme Court directed the amount to be transferred to a trust under the chairmanship of the Comptroller and Auditor General of India so that the moneys could be utilised for various programmes for the welfare of PWDs.

Then in *Chandan Kumar Banik v. State of W.B.*,[29] the Supreme Court had to intervene in order to provide respite to mentally challenged inmates of a hospital in Hooghli district who were being kept chained by the hospital administration to control their unruly or violent behaviour. And, in *Death*

25 *Ibid.*
26 *Id.*
27 (1999) 1 *SCC 467.*
28 (2004) *11 SCC 1.*
29 1995 *Supp (4) SCC 505.*
30 (2002) *3 SCC 31.*

*of 25 Chained Inmates in Asylum Fire in T.N., In re v. Union of India*,[30] the Supreme Court, on being informed about the death of 25 chained inmates in an asylum fire, took suo motu action by directing the Cabinet Secretary to frame a national policy to address issues faced by the PWDs under Section 8(2)(b) of the Act. In recent times, judicial activism in the field of human rights is beginning to become more pronounced. No longer are the courts constrained to provide compensation out of compassion, as ordered in *Hari Singh v. Sukhbir Singh*,[31] (where the victim of a murderous assault lost his power of speech); or, to provide ex gratia payment by liberal interpretation of government circulars, as ordered in *Rajanna v. Union of India,*[32] (where an SPG guard suffered permanent partial disablement in a road accident); or, to protect the appointments of blind officers through factual analysis, as done in *Jai Shankar Prasad v. State of Bihar,*[33] (where a blind member of the State Public Service Commission who had been recommended for "Padmashree" was sought to be removed on grounds that he was blind from childhood).

## The Indian Disability Laws And The United Nations Convention On The Rights Of Persons With Disabilities, 2007 (Uncrpd)

Although, there are a number of legislations relating to the persons with disabilities in our country, still the Government of India has enacted three major legislations for persons with disabilities viz. [35]

a) Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995, which provides for education, employment, creation of a barrier free environment, social security, etc.

b) National Trust for Welfare of Persons with Autism, Cerebral palsy, Mental Retardation and Multiple Disability Act, 1999 has provisions for legal guardianship and creation of an enabling environment that will allow as much independent living as is possible.

c) Rehabilitation Council of India Act, 1992 deals with the development of manpower for provision of rehabilitation services.

India has also both signed and ratified the Convention on the Rights of Persons with Disabilities (CRPD) on 30th March 2007 and 1st October 2007 respectively. It came into force on 3rd May 2008, and makes it obligatory on the part of the government to synchronise laws or legal provisions with the terms of the Convention. However, by not signing the optional protocol India has managed to safeguard itself in case of not fulfilling the commitments made under UNCRPD. [35]

## The General Principles of The Convention Along with Indian Laws are: [36]

- Recognition of inherent worth and dignity; individual autonomy and independence; non discrimination; full and equal participation; respect and accept-

[31] (1988) *4 SCC 551.*

[32] 1995 *Supp (2) SCC 601.*

[33] (1993) *2 SCC 597.*

[34] CLRA Policy Brief for Parliamentarians, *Indian Disability Laws - an obsolete picture*, available on *http://www.dpiap.org/resources/pdf/dpbriefnoclra_11_05_16.pdf, last visited on dated 29.08.2014 at about 8.05 A.M..*

[35] *Id.*

[36] *Id.*

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ance of human diversity; equality of opportunity; accessibility; equality for men and women, and respect for evolving the capacity of children with disabilities and their right to preserve their identities. Many of these principles appear in existing laws of disability, but the welfare based approach of the government presents major obstacles to all such concepts of empowerment.

• Besides the existing rights mentioned in the Acts, there are certain rights under the major themes of life and liberty rights, equality of respect and opportunity, right to association and social participation, right to political participation, right to health and double discrimination in relation to children and women in disability referred to in the CRPD but not appropriately incorporated within Indian disability laws and provisions in other statutes. Interestingly a number of these rights are included in the fundamental rights of the citizen by the Constitution of India, but without mentioning reasonable accommodation for Persons with Disabilities.

• With the signing and ratification of the CRPD, it is imperative for the legislative bodies to harmonise the existing statues of laws with the Convention.

• In order to make this feasible, existing disability laws should be evaluated in the light of the CRPD with appropriate additions and amendments. Where the terms of the Act do not complement the conventions, these must be reframed and revisited.

• All those provisions in other statutes which deny equal rights to persons with disabilities should be reviewed and amended.

• In the entire exercise of harmonising the Convention, it is essential to build a working partnership with people living with disabilities. “Nothing about us without us” is the foundation to create a pro-people society for all, in which persons with disabilities are an integral part of the same.

• Create awareness about the Convention and the rights of persons with disabilities within constituencies and among fellow parliamentarians.

• Develop needs based programmes that relate specifically to strengthening the rights of persons living with disabilities.

• Ensure that disability and development is mainstreamed into the human rights programmes.

• In order to more realistically harmonise the Convention with disability laws, existing socio-cultural institutions like family, religion, education etc. must be integrated into the process.

## CONCLUSION & SUGGESTIONS

Human rights are the fundamental or basic rights, which should not be taken away by any individual or government. They comprise within its gamut the right to life and liberty, equality, right to freedom of speech and expression and movement, trade, profession or business freedom of movement, thought, conscience and religion, right to work, right to education etc., these rights cover not only civil or political but also economic, social and cultural dimensions. They aim at promoting social progress and better standards of life in larger freedom. In a country like India the numbers of the disabled are so large, their problems so complex, avail-

able resources so scarce and social attitudes so damaging, it is only legislation which can eventually bring about a substantial change in a uniform manner. Although legislation cannot alone radically change the fabric of a society in a short span of time, it can nevertheless, increase accessibility of the disabled to education and employment, to public buildings and shopping centers, to means of transport and communication. The impact of well-directed legislation in the long run would be profound and liberating. PWD in India can be an effective statute if there is better implementation. Guidelines should be formulated and implemented. All efforts must be made to disseminate information on the rights of the disabled. Pressure groups and advocacy groups should actively work towards the implementation. The voice of the disabled is weak and society has to come out stronger. The participation of the disabled is imperative to the movement. [37]

**The Following are A Few Suggestions To Improve The Conditions of The Disabled:**[38]

- The disabled should demand benefits; we should remember that family has the prime responsibility to look after disabled and get the benefits due to them.

- The voice of the disabled needs to be recognized by the government.

- Strong encouragement and assistance needs to be given to people with mental disability and their representatives to form organizations.

- Information regarding disability needs to be disseminated far and wide across the country.

- The attitude of a professional needs to change.

- Organized monitoring of disability services and benefits disbursed is needed.

- Lacunae in mental health laws include need to periodically review existing legislation and plan amendments or bring in new legislation from time to time.

- There needs to be more research on factors associated with disability and psychiatric disorders.

- Discrimination on the ground of disabilities should be strictly penalized and punished.

- Participation in the main stream and protection against the abuse of power is the need of the hour to provide adequate safeguards to the disabled persons with suitable environment.

The time is now ripe for "social innovation", that is, the normalisation, integration, equalisation and inclusion of the PWDs. Restorative, rehabilitative, and participative support with dignity is needed to bring the PWDs back into the mainstream. There appears to be an increas-

[37] Right To Employment Of Disables: A Law Merely On Paper - Author - Priya Bansal, available on *http://www.legalserviceindia.com/articles/dab.htm, last visited on dated 29.08.2014 at about 8.30 A.M..*

[38] Disabilities research in India Kasthuri P, Chandrashekar H, Kumar C N, Prashanth N R - *Indian J Psychiatry,* available on *http://www.indianjpsychiatry.org/article.asp?issn=0019-5545;year=2010;volume=52;issue=7;spage=281;epage=285;aulast=Kasthuri, last visited on dated 29.08.2014 at about 8.03 A.M..*

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ing need to formulate policies introducing social security benefits to the PWDs. [39]

Therefore it is the duty of the national and international community as a whole to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities and to promote respect for their inherent dignity. So, the respect for inherent dignity, individual autonomy, non discrimination etc., full and effective participation in society, equality of opportunity and accessibility among others are the basic rights in their enjoyment of civil-political and socio-economic discourse. This kind of articulation of the rights of persons with disabilities is necessary if the disability law is to be made more vibrant and progressive in true sense of the term. The law has to play an important part in shaping societal attitude to disabled persons.

[39] *Supra Note 25.*

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# WHISTLE BLOWING: AN EFFECTIVE INSTRUMENT IN COMBATING HUMAN TRAFFICKING

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ABSTRACT

Human trafficking is the acquisition of people by improper means such as force, fraud or deception, with an aim of exploiting them. Trafficking in human being is modern day slavery and requires a holistic and multi sectoral approach to address the intricate problem. It affects the rights and dignity of the victim. Law can't be the only instrument to cure all problems. Initiatives also have to be taken by the common people by whistle blowing in order to put a check on the increased practices of human trafficking. Eradicating poverty and creating awareness among people can help in uprooting the evil menace of human trafficking.

The present paper studies how whistle blowing can act as an effective instrument in combating human trafficking. It also studies the concept and the related legislations and the factors responsible for such increased rate of human trafficking. The paper also discusses about few practices which if implemented might help to check human trafficking.

**Key Words :** Human Trafficking, Whistle Blowing, Best Practices.

PAGE : 7 REFERENCES : 28

## INTRODUCTION

A famous philosopher commented "*People were created to be loved, and things were created to be used. The reason why the world is in so much chaos right now is because people are being used, and things are being loved.*[1]These words are found to be very apt as the whole world is witnessing innumerable corrupt and wrongful activities. Few individual's insatiable appetite for wealth has made this century's innocent people witness and be-

1 Anonymous, available athttp://imagelovequote.blogspot.com/2012/07/inspirational-love-quotes.html(Last visited on December 10, 2014).

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come victims of a shameful and cruel practice called human trafficking.

Human trafficking is the acquisition of people by improper means such as force, fraud or deception, with the aim of exploiting them.Traffickers can be lone individuals or extensive criminal networks. Pimps, gangs, family members, labor brokers, employers of domestic servants, small business owners, and large factory owners have all been found guilty of human trafficking. Their common thread is a willingness to exploit other human beings for profit.[2] Smuggling of migrants involves the procurement for financial or other material benefit of illegal entry of a person into a State of which that person is not a national or resident.Virtually every country in the world is affected by these crimes. The challenge for all countries, rich and poor, is to target the criminals who exploit desperate people and to protect and assist victims of trafficking and smuggled migrants, many of whom endure unimaginable hardships in their bid for a better life.[3] Human trafficking is a form of modern slavery where people profit from the control and exploitation of others. Traffickers use violence, threats, deception, debt bondage, and other manipulative tactics to trap victims in horrific situations every day. All trafficking victims share one essential experience – the loss of freedom. [4]

## CONCEPT OF TRAFFICKING

In simple terms the 'Oxford English Dictionary' defines traffic as trade, especially illegal (as in drugs). It has also been described as the transportation of goods, the coming and going of people or goods by road, rail, air, sea, etc. The word trafficked or trafficking is described as dealing in something,especially illegally (as in the case of trafficking narcotics).[5]

The most comprehensive definition of trafficking is the one adopted by the UN Office of Drugsand Crime in 2000, known as the "UN Protocol to Prevent, Suppress and Punish Trafficking inPersons, Especially Women and Children," 2000 under the UN Convention againstTransnational Organized Crime (UNTOC).[6] This Convention has been signed by the government of India. Article 3 of the Convention says :[7]

**a)** Trafficking in persons shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of threat or use of force or other forms of coercion by abduction, of fraud, or deception, of the abuse of power or of a position of vulnerability or of the giving or of receiving of payments or benefits to achieve the consent of a person having control over another persons, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual ex-

2 United Nations offices on drugs and crime, *UNODC on human trafficking and migrant smuggling,* available at https://www.unodc.org/unodc/human-trafficking/ (Last visited on December 10, 2014).

3 *Ibid.*

4 Polaris,*Human Traffixking*, available at http://www.polarisproject.org/human-trafficking/overview(Last visited on December 11, 2014).

5 TsofyTafara, Child Trafficking: *Problems and Solutions*, available at *http://www.academia.edu/88267 33/Child_Trafficking_Problems_and_Solutions_Introduction_Trafficking_in(Last visited on December 12, 2014).*

6 United Nations office on Drug and Crime, *United Nations Convention against transnational organized crime and the protocols thereto*,2004 available at *https://www.unodc.org/documents/middleeastandnorthafrica//organised-crime/UNITED_NATIONS_CONVENTION_AGAINST_TRANSNATIONAL_ORGANIZED_CRIME_AND_THE_PROTOCOLS_THERETO.pdf (Last visited on December 12, 2014).*

7 Ibid.

ploitation, forced labour services, slavery or practices similar to slavery, servitude or the removal of organs; [8]

**b)** The consent of a victim of trafficking in persons to the intended exploitation set forth in sub para graph (a) of this article shall be irrelevant where any of the means setforth in sub paragraph (a) have been used; [9]

**c)** The recruitment, transportation, transfer, habrouring or receipt of a child for the purpose of exploitation shall be considered trafficking in persons even if this does not involve any of the means set forth in the above sub paragraph .[10]

**d)** Child shall mean any person less than eighteen years of age. [11]

The definition of trafficking can be found in the various sections of ITPA. [12] Section 5 speaks about procuring, taking and even inducing a person for the sake of prostitution. According to this section, even attempt to procure and attempt to take or cause a person to carry on prostitution-amounts to trafficking. Therefore trafficking has been given a broad scope.[13]

Although the above mentioned legislation is a marked a significant milestone in international efforts to stop the trade in people yet the major challenge lies in the fact that most of the criminals roam scot free as very few is convicted and hardly the victims are given proper assistance.

## ELEMENTS OF HUMAN TRAFFICKING

On the basis of the definition given in the Trafficking in Persons Protocol, it is evident that trafficking in persons has three constituent elements; [14]

### The Act (What is done)

Recruitment, transportation, transfer, harbouring or receipt of persons.

### The Means (How it is done)

Threat or use of force, coercion, abduction, fraud, deception, abuse of power or vulnerability, or giving payments or benefits to a person in control of the victim.

### The Purpose (Why it is done)

For the purpose of exploitation, this includes exploiting the prostitution of others, sexual exploitation, forced labour, slavery or similar practices and the removal of organs. [15]

To ascertain whether a particular circumstance constitutes trafficking in persons, the definition of trafficking in the Trafficking in Persons Protocol and the constituent elements of the offense, as defined

8 *Ibid.*
9 *Ibid.*
10 *Ibid.*
11 *Ibid.*
12 See *THE IMMORAL TRAFFIC* (PREVENTION) ACT, 1956.
13 Rightway, Social & Welfare Society(RSWS), *Labor Trafficking*,available at http://www.rightway. co.in/rea dmore.html(Last visited on December 13, 2014).Seealso *http://www.unodc.org/unodc/en/human-trafficking/faqs.html*
14 UNDOC, Human Trafficking, available at *http://www.unodc.org/unodc/en/human-trafficking/what-is-human-trafficking.html(Last visited on December 11, 2014).*
15 *Supra* note 14.

by relevant domestic legislation are to be taken into account.

## PRESENT STATUS IN INDIA -LEGAL FRAMEWORK

Trafficking in human beings is prohibited under article 23 of the constitution. Article 23 prohibits "**traffic in human beings and other similar forms of forced labor**".[16] Article 24 of the Indian Constitution prohibits abolition of employment of children below the age of 14 years in dangerous jobs like factories and mines. Child labour is considered gross violation of the spirit and provisions of the constitution. [17] The parliament has also passed the Child Labor act of 1986,[18] by providing penalties for employers and relief and rehabilitation amenities for those affected. Both the articles under fundamental rights are of marked importance as they aim at protecting citizens from being subjugated to environmental, domestic and work hazards.

In the existing scenario, trafficking is usually confused with prostitution and therefore, there is no proper understanding of the seriousness of trafficking. It would be appropriate here to list out the wrongs, violations, harms and crimes that are committed by various persons on a trafficked victim. These violations can be realized only during a careful interview of a trafficked person. Once the victim is allowed, facilitated and promoted to speak, the unheard story will reveal a long list of violating acts perpetrated on her. As a typical example, under the Indian Penal Code, a trafficked girl child has been subjected to a multitude of violations. She has been: Displaced from her community, which tantamount to kidnapping/abduction (Sections 361, 362, 365, 366 IPC may apply), Procured illegally (S.366 A IPC), Sold by somebody (S.372 IPC), Bought by somebody (S.373 IPC), Imported from a foreign country (if she hails from a foreign country, or even from J & K State, and is under 21 years of age – S.366 B IPC), Wrongfully restrained (S.339 IPC), Wrongfully confined (S 340 IPC), Physically tortured/ injured (S.327, 329 IPC), Subjected to criminal force (S. 350 IPC), Mentally tortured/harassed/assaulted (S. 351 IPC), Criminally intimidated (S.506 IPC), Outraged of her modesty (S 354 IPC), Raped/gang raped/repeatedly raped (S 375 IPC), Subjected to perverse sexual exploitation ('unnatural offences') (S.377 IPC).This list is only illustrative and not exhaustive. Undoubtedly, in every case, the trafficked person is a victim of at least one or more of the violations listed above. Often victims become pregnant as they are subjected to non-protective sex. In some cases, the process of exploitation has proven fatal wherein the victim succumbs to the direct effects of the harm or to the consequential problems arising thereof. This means that the offence of homicide/murder is also attracted.[19] Other special laws like Juvenile Justice(Care and Protection of children)Act 2000,Child Labour(Prohibition and Regulation Act 1986,Human Organ Transplant Act 1994 etc are also applicable in cases of trafficking.

## FACTORS RESPONSIBLE FOR TRAFFICKING

Child marriage, foeticide, infanticide, nat-

[16] See *Constitution of India,*1949,§ 23&24.
[17] *Ibid.*
[18] See *The Child Labour* (Prohibition and Regulation) Act,1986.
[19] DR.P.M.NAIR,TRAFFICKING WOMEN AND CHILDREN FOR SEXUAL EXPLOITATION HANDBOOK FOR LAW ENFORCEMENT AGENCIESIN INDIA7(2007).

ural disasters, traditional prostitutions, sex tourism are the major causes of human trafficking. Poverty is a major cause of trafficking in India. Many a time's people are deceived by false promises of marriage or employment and as a result they are trafficked. These happen because a majority community of people in India hardly make their both ends meet and are not educated and aware enough to understand the plight of deceitful promises made to them.

Trafficking in human being is modern day slavery and requires a holistic and multi sectoral approach to address the intricate problem. It affects the right and dignity of the victim. Law can't be the only instrument to cure all problems. Initiatives has to be taken by government and non-governmental organizations, civil society, pressure groups, international bodies to fight and cure the menace of trafficking in human. [20]

## ROLE OF WHISTLE BLOWERS IN HUMAN TRAFFICKING

**Sir Napoleon** has rightly said "*The world suffers a lot. Not because of the violence of bad people. But because of the silence of good people.*"[21] This statement rings so true in today's world as merely being silent and not disclosing unethical practices has become the order of the day. This is where the Whistle blowers play an effective role in fighting with trafficking.Now before getting deeper on this issue we should know who are these whistleblowers? In common Parlance, it is speaking out on Malpractices, Corruption, Misconduct or Mismanagement.[22] Whistle blowing involves the act of reporting wrongdoing within an organization to internal and external parties. It is raising a concern about malpractices within an organization or through an independent structure associated with it. Precisely it means an insider disclosing a wrongful inside matter to an outsider. [23]

Whistleblowers are usually excellent employees who in the course of doing their jobs when stumble upon evidences of wrongdoing without fear address it. Kathryn Bolkovac is one of the most prominent whistle blowers of this century. Kathryn Bolkovac is the former 'Nebraska' policewomen who served as an International Police Task Force human rights investigator in Bosnia. She was heading the gender affairs unit. In this capacity she discovered U.N. peacekeepers involvement in human trafficking and forced prostitution. Bolkovac was fired after disclosing her findings and she had to flee to her own country for her safety.Her exposure of these gross violations of human rights compelled the United Nations to remove numerous peacekeepers. But the bitter part was she had to lose her job for such a daring act of whistle blowing.[24]

From this incident it is crystal clear that

[20] Avinash Rajput, *Human Trafficking,* available at http://www.academia.edu/1480358/Human_Trafficking(Last visited on December 15, 2014).

[21] Goodreads, *Naepoleon Bonaparte*, available at http://www.goodreads.com/quotes/902425-the-world-suffers-a-lot-not-because-of-the-violence-of(Last visited on December 10, 2014).

[22] 40th National convention of Company secretaries,Vision 2020: *Transform, Conform and Perform*,available at http://www.icsi.edu/docs/40nc/40%20NC-Souvenir.pdf(Last visited on December 10, 2014).

[23] Abraham Mansbach& Y G Bachner, *Internal or external whistleblowing:Nurses willingness to report wrongdoing*, 17(4) NUR ETHICS 439(2010).

[24] KATHRYN BOLKOVAC& C. LYNN,THE WHISTLEBLOWER: SEX TRAFFICKING, MILITARY CONTRACTORS, AND ONE WOMAN'S FIGHT FOR JUSTICE(2011),See also *Government Accountability Project,* available at http://www.whistleblower.org/blog/04142014-human-trafficking-climate-change-whistleblowers-coming-stanford-university(Last visited on December 14, 2014).

even if the governmental and non governmental agencies fail to perform their share of transparency and accountability the whistle blowers from come in. Had Kathryn Bolkovac not raised her voice against the victims of such illicit sex trafficking, the United Nations would have never taken a sturdy step in uprooting such wrongful practices. Although she had to pay a heavy price of losing her job and risking her own life and safety by such brave act of whistle blowing, yet her stand on such human right abuses is remarkable and praiseworthy.

In 2010 Bolkovac's real life story was transformed into a film entitled "The Whistleblower" (2010) by director Larysa-Kondrack. The film is a very powerful and violent message about what's actually happening in the world today with these human trafficking victims. [25]

Thus this incident clearly shows that whistle blowing forms an indispensable instrument for fighting and uprooting human trafficking in every sphere. But a question always haunts us as to do whistle blowing really brings cheers to the whistle blowers? Often it is found that they themselves become victims of retaliation, demotion, harassment, persecution, discrimination and at times death for blowing the whistle.

Trafficking is universally condemned as a social evil and a criminal practice. It is not that people do not want to want to do anything but it is just that they fear due to lack of protection available to them and many a times they are unable to figure out as to how to do it. An act of whistle blowing can do miracle in rescuing humanity from the aforesaid curse. [26] Therefore robust and comprehensive laws on whistle blower's protection and by putting the policies into practice can actually create more awareness and safeguards and thereby uproot human trafficking.

## PILOTING GOOD PRACTICES[27]

- Creating a database on trafficking including routes, vulnerable areas, information about traffickers and their whereabouts, information about NGOs working in this filed in different districts and states, information about local bodies, Panchayats and self-help groups in the vulnerable areas.
- Drawing up specific guidelines for investigation and prosecution of trafficking.
- Permanently closing brothels known for repeated offences.
- Creating Victim Compensation Fund so as to provide vocational trainings, give loans etc. so as to enable victim to become economically independent.
- Promoting programs to stop second generation trafficking by providing educational options to the children of sex workers and other vulnerable children.
- Promoting education and awareness programmes .
- Developing effective channels for reporting wrong doing .
- Creation of more employment opportunities by the government.
- Developing a more adequate whistle blowers policy for better protection of whistle blowers of human trafficking.

[25] Lia Petridis Maiello ,When Peacemakers Become Perpetrators: *Kathryn Bolkovac Introduces The Whistleblower at the UN*, available at http://www.huffingtonpost.com/lia-petridis/the-whistleblower-author-interview_b_266323 1.html?ir=India(Last visited on December 17, 2014).

[26] SAMARAK SWAIN, *SOCIAL ISSUES OF INDIA*(2013).

[27] Malavika Kumar, *Trafficking in Women and children* 'An ounce of prevention is worth a pound of cure', available athttp://www.legalserviceindia.com/articles/tch_wo.htm(Last visited on December 18, 2014).

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## CONCLUSION

The phenomenon of trafficking in humans is widespread across the world. It is a socio-economic offence and greatly affects the society. It makes people question their safety and the efficacy of the state machinery. It is the combined duty of the state and society to fight trafficking and protect the vulnerable groups. [28]

Thus the lack of an integrative approach towards prevention, rescue, repatriation and reintegration presses for a new legislation and there exists a need for initiation of public information campaigns to make both potential victims and the general public aware of the terrible exploitation and possible loss of life inherent in trafficking in women and children.In this aspect it can be said that whistle blowing forms an effective pillar in combating human trafficking.

Evils of trafficking have spread to every nook and corner of the globe. Awareness of occurrence of such crimes, effective criminal justice system and vigilant citizens can help to check trafficking. Therefore, the researcher draws the curtain of conclusion that the present time demands the governmental, non-governmental organizations and also the common rank and file to join hands and take sturdy step at a rampant stage against any kind of exploitation of human beings.

[28] Eira Mishra, *Combating Human Trafficking:* A Legal Perspective with Special Reference to India, 1(4) HRPUB 172( 2012).

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# JUDICIAL PROCESS IN INDIA: A CRATOLOGICAL CRITIC

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ABSTRACT

Judicial power is a method to prevent the cases of abuse of power and neglect of duty by power holders and judiciary in the light of the application of cratology is the most effective organ for taming and delivering justice. The notion of a controlling Constitution makes it mandatory upon the courts to eschew the model of leviathan in the study of power. However, in India, the scheme adopted by the judiciary has consistently effected parity of power ingrained in the Constitution and consequently destroyed the substance thereof. It is in the light of the above mentioned statement that the judicial process in India has been analyzed; emphasizing that for judicial process to get started, the mandate of the controlling Constitution is to be faithfully respected.

**Key Words :** Article, Constitution, Control, Judiciary, Parity, Power .

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## INTRODUCTION

The judiciary has come into adverse notice because of many difficulties created in connection with the role adopted, the powers exercised by it in contrast to what the title of judiciary under the controlling-Constitution is [1].

Judicial process is neither a process of avulsion nor that of erosion, and in India though judicial power is the basic structure of the Constitution and is protected of even constitutional amendments, in totality the anecdote of judicial process is full of absurdities. There have been occasions

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[1] Law is understood as power. A constitution reflects the principles on which the relationship between power holders and power addressees is based. A constitution then becomes the legally permitted matrix for exercise of power validly and access to power. A written constitution influences the shape of action in a particular manner designed in the document. As a national constitution involves the ways of huge number of people or in other words the power matrix for exercise of power in the state society, the value choices embedded in the constitution would be those around which specific denials, directions, divisions, permissions or prohibitions of power are set down, and they would point the way for a legally proper method for exercise of power. The Constitution as an institution, therefore, would regulate the power play in the society which it seeks to order. And that is what makes the Constitution of India a controlling Constitution. *See* **Karl Loewenstein**, Political Power And The Governmental Process, 8 (1965), The containment of political power by the containment of the power holders is the crux of what in political history, ancient and modern, appears as constitutionalism.

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when the superior courts have upheld the sanctity of the controlling Constitution, but in totality the judicial process has failed to answer all the bands of the power spectrum. Judicial process is within the mandate of Article 14 of the Constitution of India and all that would seem necessary for judiciary is to deny any time gap in the approximation of the "is" to the "ought".

## JUDICIAL PROCESS IN INDIA: A CRATOLOGICAL CRITIC

Usurpation by judiciary has cautioned the cratology[2] based analysis. The judicial process is to be set in motion, but with new point of departure, a new impetus and direction.[3]

The Constitution of India envisages establishing parity of power by providing equality before law and equal protection of the laws, and the three organs of the State – the Legislature (entrusted with policy determination), the Executive (policy execution) and the Judiciary (policy control) have to function to achieve the aims of the Constitution .[5]

The Constitution of the India was hailed by many and a lot of faith was consigned to it by the people of the country. [6] Indian Constitution, which is a fundamental document ,[7] establish 'parity of power' by providing Denial of Power (The provisions in Part III, Fundamental Rights, are characterized by a denial broadly of power to abridge or take away any of them. This denial of the power to the State coupled with Article 32 therein which confers on every individual the fundamental right to move to the Supreme Court of India to enforce the fundamental rights makes it a controlling Constitution); Direction of Power (Directive Principles of State Policy prescribe the purposes for which the State power is to be used. It conceives of rights more in positive right to than negative freedom from terms and favors the intervention rather than the abstention of government) and Distribution of Power [8] (Article 245 to 255 and the Seventh Schedule).

[2] *See* John Agresto, The Limits of Judicial Supramacy, 47 Georgia Law Review, 471 (1980). See also Alexander Bickel, The Least Dangerous Branch, 3-4 (1962),

[3] Cratology is the science of power. The duty in terms of cratology is to contain the unequal flow of influence between power wielder and power yielder. It is necessarily connected with the interest count, head count, ethical count, influence count, time count of power spectrum. It is contended that the judiciary shall abide by all the spectrums in and at appropriate cases; else restitutive justice will be defeated on ground. See Julius Stone, Social Dimensions Of Law And Justice, (1999).
Foucault has given an interesting definition of power which is the subject of study in cratology. He says that power must be analyzed as something which circulates . . . which only functions in the form of a chain. It is never localized here or there, never in anybody's hands, never appropriated as a commodity or piece of wealth. Power is employed and exercised through a net-like organization. And not only do individuals circulate between its threads; they are always in the position of simultaneously undergoing and exercising this power. They are not only its inert or consenting target; they are always also the elements of its articulation. In other words, individuals are the vehicles of power, not its point of application. See M. Foucault, Two Lectures On Power/Knowledge, Selected Interviews And Other Writings, 1972-77, 102 (C Gordon ed., 1980); See also Karl Loewenstein, Political Power And The Governmental Process, 8 (2nd edn., 1965).

[4] Analysis of judicial process involves analysis of the genesis and growth of law and this involves a study of functions and of ends. What do you mean by law? And how is it created? After it is created, how is it extended or developed? What are the principles that guide the choice of paths when the judge, without controlling precedent, finds himself standing uncertain at the pertaining of the ways? What are the directive methods to be obeyed, the methods to be applied, the ends to be sought? *See* Benjamin N. Cardozo, The Growth Of The Law, 21 (First Indian Reprint, 1995)

[5] The rights guaranteed in the Constitution of India are non-violable by all the three power-holders – the Legislative, the Executive and the Judiciary.

[6] *See*, Anup Chand Kapur, Constitutional History Of India 1765-1790, 463 (1999).

[7] The provisions of the Constitution make it a fundamental law of superior obligation.

[8] It may be noted that cratology is the study of power and the basic structure of controlling the power is to be found in the Constitution.

The compulsion of Article 14 not to deny equal protection of the laws would place a duty on the State to deliver promise of the law on the ground. Article 14 of the Constitution significantly addresses to the six bands of the power spectrum[9] and with reference to the judicial process mandates it not to allow any time gap for the approximation of the 'is' to the 'ought'.[10]

Judicial process[11] is basically the path or the method of attaining 'justice'. Justice is the approximation of 'is' to 'ought'. Judicial process involves the legal ordering of facts [12] and is under the obligation to approximate the "is" to the "ought". The result of such approximation is delivery of justice .[13]

The role of the judiciary[14] in a controlling Constitution[15] becomes important to check failure to use power by the power holders in the manner required by the Constitution. The function of the judiciary is thus of policy control [16] and this becomes critical in the realization and enjoy-

[9] Article 14 of the Constitution has encrypted a great principle for ensuring the rule of law in words that conceal reference to its potential as a brooding omnipresence in the sky bringing under its sweep all the six bands of the power spectrum. T.Devidas, and Hemlal Bhandri, Judicial Accountability, 48 *Journal Of Indian Law Institute* 94 (95).

[10] Article 14 of the Constitution of India neither gives any discretion to the courts nor any time limit, in matter of violation of fundamental rights because the command of the provision is that the 'State' shall not deny to any person the equal protection of the laws. Both action and non-action stand equally covered and the 'State' is placed under an enforceable duty to ground the equal protection of the laws. It is contended that the judiciary shall abide by all the spectrums in and at appropriate cases; else restitutive justice will be defeated by delays.

[11] Judicial process is a method to prevent the cases of abuse of power and neglect of duty by the power holders.

[12] The most important question that remains in any philosophical survey on the concept of law is the means of attaining and delivering 'justice'.

[13] Justice is the legal ordering of facts.

[14] What is the title of the judiciary in a democratic society to have the final say whether the action of each branch is within the constituent grant, especially when (as in most countries) no such judicial power is expressly conferred? This question, despite Marshall's answer to the legal form of it in the early years of the American Union, continues echoing in modern political controversy as to the title of the judiciary to represent the supreme power of the people. Nothing but "theocratic myth" (it has been recently charged), with lawyers as its "priesthood", supports such a role of judges. See Julius Stone, Social Dimensions Of Law And Justice, 710 (1999).

[15] It is pertinent to mention here what Lord Acton has said, "Power tends to corrupt and absolute power tends to corrupt absolutely". To prevent this ever present danger inherent in power, the organized state imperatively requires that the exercise of power be contained and restrained. Human nature being what it is, such restraints cannot be expected to operate automatically; they must be carried into the power process from outside. An agreed set of fixed rules, binding the power holders and the power addresses alike can be the most effective device to prevent the abuse of power by the power holders. And in India, a written constitution was thought to be the most appropriate device for the containment of such power. And a device of three Institutional Mechanism was introduced each entrusted with execution of Policy Determination, Policy Implementation and Policy Control, separately. For a detailed study on the use and control of power in the Governmental Process refer to Karl Loewenstein, Political Power And The Governmental Process, 8 (2nd edn., 1965).

[16] The executive is responsible for ensuring that social orderings mature into legal orderings, in accordance with the policy laid down. In other words the executive ensures the approximation of "is" (fact) to the "ought" (Law). Whenever there is a mismatch in the approximation of "is" to the "ought", the Judiciary steps in to correct this mismatch, and expound the policy. When the judiciary implements or reverses the action of the executive or interprets the law and decides whether law is in conformity with the policy or not, judiciary acts as a policy controller. This is known as policy control and in a controlling constitution this is what the judiciary is required to do. Any resolution of disputes is only incidental and consequential to the process of policy control. According to Karl Loewenstein

The judiciary exercises effective inter-organ controls i.e. (horizontal controls) towards the other two power holders. These controls are of three types (1) to supervise and control the administrative activities of the executive so that they act in conformity with the statutes (2) the judicial review of the constitutionality of the legislation endorsed conjointly by the government and the parliament, and (3) in certain jurisdiction, the arbitral decision over jurisdictional conflicts concerning the functional performance of other power holders. **Karl Loewenstein**, Political Power And Governmental Process, 239 (2nd edn., 1965).

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ment of guaranteed fundamental rights.

A judicial action is also State action,[17] it would be necessary for the judiciary not to allow any time gap for approximating the "is" to the "ought" and deliver the promise of law on ground. Judicial procedure will have to ensure that impugned unconstitutional state action is routinely and automatically strayed for, else, restitutive justice would be defeated by delays.

A distinctive feature of the Constitution of India is that it confers through Article 32 on every person a fundamental right to move the highest court of the law for the enforcement of any of the fundamental rights. Parallely Article 226 of the Constitution of India empowered the High Courts to provide similar care with only one difference that the law laid down by the Supreme Court was alone to be the law of land .

The right[19] is an interest recognized and protected by law, and the guarantee becomes vital for the enjoyment of the rights and it now stands reinforced by the Supreme Court holding that judicial review[20] is part of the basic structure of the Constitution[21] and is protected of even constitutional amendment.

It is well settled that the role of judicial institution in any legal system is primarily adjudicatory[22] declaratory of law[23] , ensuring parity [24]of power[25] , policy control

[17] In *A. R. Antulay v. R.S.Nayak* AIR 1988 SC 1701, Supreme Court affirmed that judiciary is also covered under the definition of 'State' as provided in Article 12 of the Indian Constitution

[18] Article 141 of the Constitution reads as: "The law declared by the Supreme Court shall be binding on all courts within the territory of India".
Thus, one can fairly draw the conclusion that in India the judicial power is exercised only in the Supreme Court and all other subordinate courts including the high courts perform only purely administrative functions.

[19] Tracing the origin and evolution of 'right' will inescapably invite a debate. Many who approach the subject of 'right' turn to early religious and philosophical writings. For twenty-four hundred years-from Greek thinkers of the fifth century B.C. who asked whether right was right by nature or only by enactment and convention, to the social philosophers of today, who seek the ends, the ethical basis and the enduring principles of social control- the philosophy of right has taken a leading role in all study of human institutions. For subsequent inquiry see Hegel's Philosoply Of Right (T. M. Knox, trans., 1942). See also Rudolph Stammler, The Theory Of Justice, XI (Isacc Husik trans., 2000). See also John Locke, Two Treatises Of Government (2004).

[20] Judicial review is the power of the court to pronounce upon the constitutionality of legislative acts. What is now argued about in these terms is not, of course, whether there should be judicial review at all, but rather what should be its purposes, and consequent ambit?
For a critical analysis of exercise of judicial power rested upon epic decision in *Marbury v. Madison* refer to William W. Van Alstyne, A Critical Guide to *Marbury v. Madison*, 1 *Duke Law Journal* 1-47 (1969)

[21] In *Kesavanand Bharti v. State of Kerala*, AIR 1973 SC 1461, it has been held that the judicial review is the basic feature of the Indian Constitution and therefore, it can not be damaged or destroyed by amending the Constitution under Article 368 of the Constitution.

[22] The statement does not mean that every problem is capable of resolution through the adjudicatory process by the judiciary. L.L. Fuller, for instance, identifies 'polycentric' problems which require a non-adjudicative solution. See LL FULLER, The Forms and limits of Adjudication, 92 *Harvard Law Review* 353, 394 (1978). Eisenberg calls them "problems of multiple criteria." See Participation, Responsiveness and the Consultative process, 92 Harvard Law Review 410, 424 (1978). Another view is that the analyses offered by the both Fuller and Eisenberg are not exhaustive in the terms of identifying the kinds of the problems which are unsuited to the resolution by adjudication. See Ian Matheson, Adjudication and dispute Settlement, 13 Victoria University Of Wellington Law Review 151, 156 (1983). See also, Allison J.W.F., Fuller's Analysis of Polycentric Disputes and the Limits of Adjudication, Cambridge Law Journal 367 (1994). It has to be remembered that all the problems capable of judicial adjudication do not actually reach the courts.

[26], a process of deductive reasoning[27], to deliver substantive promise of law[28] and by restraining itself from usurpation[29] so as to maintain the sanctity of judicial process, without being accused of adventurism or activism [30]. There have been the occasions when the superior courts have upheld the sanctity of the controlling Constitution, but in totality the judicial process is full of absurdities and has failed to answer all the bands of the power spectrum.

A plain reading of the Indian constitutional scheme suggests that judiciary was conceived of as a policy controlling body [31]having the authority to declare the law and to interpret it in cases of ambiguity [32]. It was never conceived of as possessing any authority for law making because policy making has been always regarded as an exclusive function of the legislature [33]. However, the judiciary in India has, time and again, abrogated to itself such powers that it has resulted in an imbalance for the original constitutional arrangement. Judicial process is neither a process of avulsion nor that of erosion and this fundamental principle does not seem to have kept consistently in view by the judiciary .[34]

The judiciary has failed35 to perform policy controlling [36], to establish parity of power[37] , to take judicial notice[38] , to decide strictly according to law[39] , to be declaratory[40] , to give deductive reasoning [41], to abstain from activism[42] , to do complete justice [43], to take cognize of Directive Principles of State Policy [44] or to respect the doctrine of self restraint[45] . The impotency of judiciary is patent for it shows no respect to the compulsions of Article 14 of the Constitution.

## CONCLUSION

It would be incorrect to argue that the pannomion[46] is incapable to regulate the judiciary. The role of the judiciary as a containing organ[47] becomes even more

[23] For early formulation of the theory *see* Mathew Hale, The History Of The Common Law Of England, 45, 46 (1971) and Blackstone, *Commentaries On The Laws Of England*, Vol I, 88, 89(edn.,13th). *The following observation of Lord Esher in Willis vs. Baddeley,* (1892) 2 Q.B. 324 show continued adherence to declaratory theory: "There is, in fact, no such thing as judge made law, for the judges do not make the law." For a modified modern version of the declaratory theory see Wechsler, Towards Neutral Principles of Constitutional Law, 73 *Harvard Law Review* 1 (1959)

[24] *See* M. Foucault, Two Lectures On Power/Knowledge, Selected Interviews And Other Writings, 1972-77, 102 (C Gordon ed., 1980). In modern democracy it has to tackle the monolithic institutionalization of power in the single party.

[25] For detailed analysis on the concept refer to Id; see also *See* also Thomas Lemke, Foucault's Hypothesis: From the Critique of the Juridico-Discursive Concept of Power to an Analytics of Government, 9 Parrhesia: *A Journal Of Critical Philosophy* 31-43 (2010).

[26] For detailed analysis on the concept refer to Karl, *supra* note 3.

[27] It is pertinent to mention here that in judicial process, the judiciary is required to ascertain the facts and apply the appropriate law to the facts, ascertained which is what is called legal ordering of facts.

[28] This often requires the 'ought' prescribed by law to be clearly stated.

[29] It was never conceived of as possessing any authority for law making because policy making has been always regarded as an exclusive function of the legislature. "There is no liberty, says Montesquieu, if the power of judging is not separated from the legislature and from the executive power. If it were joined to legislative power, the power over life and liberty of citizens would be arbitrary; for the judges would be legislators. If it were joined to executive power, the judge might have the force of an oppressor. Refer to Montesquieu, Esprit Des Lois liv XI, C VI. For detailed discussion see Pound Dean Roscoe, Executive Justice, 55(03)The American Law Register 137-146 New Series (March 1907)

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important in the light of the fact that, "societies naturally divided themselves into 'progressive' and the 'unprogressive'-a dichotomy which roughly corresponded to that between the Occidental and the Oriental.[48] Judicial decisions acquire significance in the light if their role in dispensing justice .[49]

No one could have anticipated the deterioration of constitutional principles at the hand of the learned [50] judges of the superior judiciary.[51] The Supreme Court has properly failed in adjudicating upon thorny doctrinal issue of state's affirmative duties under Part III and Part IV of the Constitution which are respectively proclaimed to be the heart of the Constitution[52] and fundamental in the governance of the country.

The following analysis seeks to demon-

[30] Activism is sought to be supported under the guise of changing social needs. It is submitted that whatever may be the cause such aberration and abrogation can't be justified. See Benjamin N. Cardozo, The Growth Of The Law, 21 (First Indian Reprint, 1995). See also W. Friedman, Legal Theory, 342 (Fifth edn., First Indian Reprint, 1998). Even Cardozo's searching and balanced investigation fails to make the major problems of judicial interpretation entirely articulate. The increasing complexity of modern legislation and social problems arises some fundamental problems as to the position of the legal interpreter in the political and social development.

[31] Here it is pertinent to mention the oft-quoted observation of chief justice Marshall of U.S. Supreme Court that, "We therefore reaffirm that it is 'emphatically the province and the duty' of this court to say what the law is." *See Marbury vs. Madison Justice Marshall while defining judicial power said that judicial powers extend to stating authoritatively what the law is. The definition emphasizes on the declaratory character of judicial power. See also See Mcculloch vs. Maryland, 4, Wheaton, 315 (1815), "Judicial power, as contradistinguished from the power of law, has no existence. Courts are the mere instruments of the law, and can will nothing.* " See also *UOI v Azadi Bachoo Andolan* (2003) 132 TEXMAN 373SC, "the maxim judicis est jus dicere non dare, pithily expounds the duty of the courts".

[32] All the influences that can produce a lack of congruence between judicial action and statutory law can, when the court itself makes the law, produce equally damaging departures from other principles of legality: a failure to articulate reasonably clear general rules and an inconsistency in decision manifesting itself in contradictory rulings, frequent changes of direction, and retrospective changes in the law. The most subtle element in the task of maintaining congruence between law and official action lies, of course, in the problem of interpretation. Legality requires that the judges and other officials apply statutory law, not according to their fancy or with crabbed literalness, but in accordance with the principles of interpretation that are appropriate to their position in the whole legal order. Lon L. Fuller, The Morality Of Law, 82 (First Indian Reprint, 1995).

[33] See for details Karl Loewenstein, Political Power And The Governmental Process, (2nd edn., 1965).

[34] It is so even in the case of pressing social needs. See Benjamin N. Cardozo, The Nature Of Judicial Process, (First Indian Reprint, 1995). See also for subsequent inquiry see Chapter 13 and 14 of Julius Stone, *Social Dimensions Of Law And Justice*, (1999).

[35] Many years ago, when Felix Frankfurter was a professor at Howard, he had warned against relying on judges and the courts to save freedom. See Pran Chopra The Supreme Court Versus The Constitution: A Challenge To Federalism, 81(2006).

[36] One such instance is to be found in *Charanjit Lal Chowdhuri v UOI* AIR 1951 SC 41, where it decided that there is always a 'presumption of constitutionality' in favour of legislative action. The mandates of Article 13(1) and 13 (2) do seem to have not adequately noticed in relation to this policy control dimensions. It also affected the head count, interest count and ethical count of power spectrum.

[37] In *Kasturi Lal v State of UP* AIR 1987 SC 27, court renounced its duty to establish parity of power. In *Naresh Shridhar Mirajkar v State of Maharashtra* AIR 1967 SC 1, the non application of mind, by majority except the position of Hidayatullah J., which was in conformity with the scheme of the Constitution, to the parity of power principles ingrained in Article 14 of the Constitution seems to have suffered and consequently destroyed.

strate that this concern presents a common threat to the scheme of the Constitution and the substance thereof. The judiciary continues to struggle with motive judicial process. In practice the judiciary has since, from its establishment[53] , distorted the coherent constitutional imperatives and the basic idea of fidelity of judicial process in the light of a controlling Constitution has become to a halt.

The notion of a controlling constitution makes it mandatory upon the courts to eschew the model of leviathan in the study of power.[54] The judiciary, as an independent power holder for policy control, has to respect the separation of power[55] and ac-

[38] In presence of statutory obligation under Section 57 of Indian Evidence Act it is obligatory on part of the courts to take notice of the existing facts. The court, however, has patently failed to do so in Olga Tellis case, Jessica Lal's case, Pridharshini Mattu's case or for that matter the recent scams in the State.

[39] In *Ram Jawaya Kapur v. State of Punjab* AIR 1955 SC 549 and *Samsher Singh v. State of Punjab* AIR 1974 SC 2192. The Supreme Court while interpreting Article 74 of the Constitution of India categorically failed to distinguish between power and function and accordingly failed to decide strictly in accordance with law.

[40] In *M R Balaji v State of Mysore* AIR 1963 SC 649, the Supreme Court seems apparently have lost its direction and failed to declare the mandate of the law. The mandate of Article 14 made it explicitly clear that in order to provide reservation the requirement of a law is a must and the purpose and reasonability of this law is subject to the constitutional filter of Article 13. The court failed to read and declare the law in this case.

[41] *See* Introduction by Upainder Baxi to I P Massey, Administrative Law, XLII (Seventh edn., 2008).
In Olga Tellis a paradigmatic judicial decision which still ails to yield a considered reasoned "judgment." I [Upainder Baxi] have consistently maintained that if any "judgment" we mean a discourse where reasons or grounds of decision have at least some bearing on the final result or order, Olga Tellis, can not be dignified with that description. The result there so contradicts the operative order as to make it insensible, both legally and logically. Not all documents signed by justices and published in law reports necessarily become binding judgments. Undoubtedly, situations in which one would have to take such a stance as I do with respect to Olga Tellis would be rare. But when they occur, it is our duty to explain that as a matter of fact no "judgment" appears despite a purported act of issuing it and our right to insist that the Court deliver a judgment (emphasis supplied).

[42] In fact judicial activism gives scope for arbitrariness and its abrogation of power. In the legendary strategic mazes created by judicial activism many Abhimanyu's of modern day have met tragic fate in their struggle to secure human rights. See S P Sathe, Judicial Activism In India: Transgressing Borders And Enforcing Limits, (2003).

[43] Its failure in doing complete justice was patent in the case of *Mohini Jain v. State of Karnataka* AIR 1992 SC 1858, where the court failed in doing restitutive justice. It took five years for the court to decide that case. Article 14 of the Constitution significantly addresses to the time count by not allowing any time gap for the approximation of the 'is' to the 'ought'. *Hussainara Khatoon v State of Bihar* AIR 1979 SC 1360 is another instance.

[44] In the case of *Olga Tellis and Others v. Bombay Municipal Corporation and Others* AIR 1986 SC 180, the court did not utilize the interpretative value of directive principles which are fundamental in the governance of the country.

[45] At numerous instances the doctrine of self restraint an emanation of the doctrine of separation of power has been shamelessly encroached upon, inevitably destroying the substance of constitutional imperative.

[46] *See* J.H. Burns, and H. L. A. Hart, A Collected Work Of The Jeremy Bentham: *An Introduction To The Principles Of Morals And Legislation,* (1996)

[47] It has to be understood in light of necessary administrative fact ordering. See Julius Stone, *Social Dimensions of Law and Justice*, 595 (1999). See also Julius Stone, The Province and Function of Law, (1946).

[48] Sir Henry Sumner Maine, Ancient Law: Its Connection with the Early History of Society and Its Relation to Modern Ideas, xvii (1950).

cordingly principles of parity of power. It has been said[56] that, the function of judicial review [57] is to improve decision-making by facilitating "Machtkampf"[58] among the branches of government.[59] From a cratological perspective it is the most effective organ for taming and limiting State power.[60] The judiciary will have to be leading by example and observing faithfully the limitations on State power falling on its own actions by virtue of the provisions of the Constitution.

[49] Julius Stone, *Human Law and Human Justice*, 3 (Third Indian Reprint, 2008). Here it is pertinent to mention that pound identifies theories of justice such as metaphysical, social, utilitarian, neo-Kantian, neo-Hegelian, neo-Idealist, neo-metaphysical, neo-scholastic, and positivist. See in general Pound, Outlines 197-206, Deriving from Kant, Rechtslehre. He instances inter alia J. Lorimar, Institutes of Law (1872, 2 ed. 1880).

[50] If at all.

[51] Here I am reminded of the oblivion of the 'great' justice P.B. Gajendragadkar in Kasturi Lal's case where he shamelessly affirmed the incompetence of the Supreme Court in granting justice.

[52] See J.S. Verma, The Constitutional Obligation of the Judiciary, 7 *Supreme Court Cases Journal* 1, (1997)

[53] In Shankri Prasad case AIR 1951 SC 485; Sajjan Singh's Case AIR 1965 SC 845, the Supreme Court allowed an extra constitutional method of hiding unconstitutional laws from judicial scrutiny and made a mockery of the controlling character of the Indian Constitution.

[54] For details see Foucault, *Supra* note 3

[55] For subsequent inquiry *see Supra* note 3, at 667.

[56] For a criticism of Supreme Court's involvement in "Machtkampf". *See* Henry J. Abraham, *The Judicial Process* 371 (7th edn., 1998).

[57] For better discussion see Hamilton who expressed his view in FEDERALIST NO. 78:
The interpretation of the laws is the proper and peculiar province of the Courts. A Constitution is, in fact, and must be regarded by the Judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular Act proceeding from the Legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or in other words, the Constitution ought to be preferred to the statute; the intention of the People to the intention of their agents.
See Alexander Hamilton, *The Federalist No.* 78, 544-45. (Henry B. Dawson ed., 1891).
For a description of the historical precursors of this view, see Sylvia Snowiss, *Judicial Review And The Law Of The Constitution* 13-44 (1990).

[58] Meaning thereby struggle for power, See *Henry J. Abraham*, The Judicial Process 371 (7th edn., 1998).

[59] *See* Yuval Eylon, and Alon Harel, *The Rights to Judicial Review*, 92 (05) *Virginia Law Review* 991- 1022 (Sep., 2006).

[60] It requires progressive i*nstitutionalization and use of the devices in the form of the Constitutional provisions.*

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1. *A.R. Antulay V. R.S.Nayak* AIR 1988 SC 1701 .
2. *Charanjit Lal Chowdhuri V UOI* AIR 1951 SC 41 .
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# INTERNATIONAL NEGOTIATIONS ON CLIMATE CHANGE: A PRAGMATIC APPROACH FOR INDIA

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ABSTRACT

Climate Change is a serious global environmental concern. It is primarily caused by the building up of Green House Gases (GHG) in the atmosphere. The global increase in carbon dioxide concentration are due primarily due to fossil fuel use and those of methane use change, while nitrous oxide are primarily due to agriculture. Global Warming is a specific example of the broader term "Climate Change" and refers to the observed increase in the average temperature of the air near earth's surface and oceans in recent decades. Its effect particularly on developing countries is adverse as their capacity and resources to deal with the challenge is limited. Scientific studies have shown that the global atmospheric concentrations of carbon dioxide, methane and nitrous oxide which are the most important Green House Gases, have increased markedly as a result of human activities since 1750 and now far exceed pre-industrial values. With this backdrop, this paper is an attempt to highlight the efforts made at international level to tackle the issue of climate change.

**Key Words :** Climate Change, Atmosphere, Greenhouse Gases, Environment.

PAGE : 8 REFERENCES : 6

## INTRODUCTION

There is broad scientific consensus that continued emission of greenhouse gases (GHGs) at or above current rates will cause further warming and induce many changes in the climate system during the 21st century will likely to be larger, with more adverse impacts, than those seen during the 20th century. Climate change is projected to have severe adverse effects on India's economy and development with rapid urbanization, and economic growth. The sectors that have the highest vulnerability to these impacts are water resources, ecosystem and agricultural productivity. It is also seen to have an adverse impact on the lives of poor. Rising temperatures, changes in rainfall patterns, and even increased frequency of floods and droughts are likely to have serious effects on rural populations. During the

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last 30 years around 80 sq km of the Sundarbans have entirely disappeared with the sea level rising at an average rate of 3.14 cm a year—much higher than the global average of 2 mm. Estimates are that 70,000 people out of the 4.1 million living in these islands would be rendered homeless by 2020 in these parts alone. Approximately 24 million people are estimated to have been displaced so far by climate change. Some estimates envisage that by 2020 around 70 million people will be dislocated by global climate change and by 2050 this figure could exceed 150 million.

The national and international organizations and institutional mechanisms are not sufficiently equipped to deal with all these challenges. One school of thought is that the non-environmental friendly policies by industrialized countries amount to "environmental violence" and this qualifies the victims of such violence to get redress and compensation from the polluters. The recently concluded Copenhagen Accord is practically silent on many issues, especially the carbon market and the future of the clean development mechanism (CDM). This paper offers a new approach that the international community might take on the issue of climate change.

## The Science of Climate Change

The increase in earth's overall temperatures due to emissions of greenhouse gases (GHGs) is increasing the occurrence of severe climatic conditions like floods, famines, heat waves, and tornados. In addition to these natural calamities, the lower agricultural yields, melting of glaciers, rise in sea waters, and extinction of species, are witnessed throughout the world. The major sources for carbon emissions are burning of fossil fuels for the purpose of electricity generation by the power plants; rest of the emissions result from gasoline driven vehicles that release huge quantities of carbon dioxide in the atmosphere. If the emissions continue to grow at the present rate, the day would not be far when human beings could be listed as one of the endangered species due to environmental threat of climate change.

The majority of uncertainties regarding the science of climate change are related to the relative importance of various effects that would accelerate climate change to a greater or lesser degree. The scientific analysis of global warming clearly indicates that the current stock of GHG in the atmosphere, particularly carbon dioxide has already set global temperatures rising. The current concentration of carbon dioxide in the atmosphere is approximately 379 parts per million (ppm) as of 2005. For 2010, the global average was 389.90 ppm (Carbon Dioxide Information Analysis Centre 2010) and in 2014 it was 398.60. In the month of January, 2015 it was 399.85(Scripps Institution of Oceanography, University of California).

Climate change will affect everyone, and the only way we can effect positive change in the race to reverse these damaging trends is if everyone works together. Today, the international community has started to realize not only the reality of what is happening to our planet, but also see the wisdom in addressing this critical issue from both a humanitarian and economic standpoint.

## Global Policies and Plan of Action

The 1992 Earth Summit in Rio de Janeiro marks the moment in which the aware-

ness of the global dimension of the ecological crisis was 'finally' accepted and confronted politically around the world. Rio certainly spelled out some massive problems: the need to reduce carbon dioxide emissions, the limited sustainable pathways to development in the South, the need to fight poverty and stop deforestation, as well as the need to develop new strategies for water resources management and the protection of biodiversity. What is more, Rio established 'Agenda 21', a package of long-term goals that were to form the basis of a concerted effort to address these problems. In the spirit of the common bonds at the 'Earth Summit' it was also agreed to reconvene after five years to review the spirit and keep the momentum. The 'Rio-plus-five' conference held in New York in 1997 was, above all, a wake- up call. It offered a very disturbing finding—none of the important commitments made at Rio had been kept. In spite of the agreement to bring down carbon dioxide emissions to the 1990 levels by the year 2000, emissions in 1997 were higher than ever before. Furthermore, the intention to raise northern aid for the sustainable development of the southern countries to 0.7% of the GDP in 1992 went entirely unheeded. A mere five years after Rio, even less foreign aid was available than at the time of the Rio summit itself. Equally troubling, the forest cover continued to decline, the management of water resources was seen to have failed, and the commitment to defend biodiversity had been neglected.

The Kyoto Protocol (which came into force on February 16, 2005) sets targets for its member states whose number has increased to 181 countries in 2008. Although the US is the largest emitter of GHG, it refused to be the member of the Protocol. India, a signatory to the Protocol, has promised to reduce its emissions. The Kyoto Protocol exempted developing countries from greenhouse gas emissions targets but the industrialized countries listed under Annex I were required to meet targets through measures such as emissions trading (the carbon market), clean development mechanism (CDM) and joint implementation. The Kyoto Protocol also require Annex I countries to report the extent of emissions and mitigation measures that they undertake.

The problem with Kyoto Protocol is that in the coming times, after few decades, the developing countries will be the world's largest emitters, so the targets and timetable as designated by the Protocol will not have much value, especially for India. The coming years will undoubtedly witness intensive negotiations on climate change as the quantitative approach under the Kyoto Protocol will have little significance. The new agreement and commitment will be truly global and legal in character to include both developing and developed countries on the basis of overall emissions, irrespective of per capita emissions. The Bali Action Plan calls for enhanced action on the Kyoto Protocol as the measurable, reportable and verifiable (MRV) emission reduction commitments on the part of developed countries.

The recently concluded Copenhagen Accord on climate change negotiations has disappointed many sections of world opinion that had looked forward to an equitable and sustainable global plan of action to combat global warming. There was hope that the broad parameters of a future global deal would be agreed to at Copenhagen based on the principles of equity and justice, but in fact there was no "legally binding" political declaration on which a future agreement can be built. The Copenhagen Accord recognizes the

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broad scientific view that the increase in global temperature should be below 2 degrees Celsius, and agrees to enhance cooperative action, on the basis of equity. The Copenhagen Accord records the collective commitment of developed countries to provide new and additional funds of 30 billion dollar in 2010-12 through international institutions.

The Kyoto Protocol links developing country action to financial assistance, capacity building and technology transfer from developed countries. The Copenhagen Accord however requires developing countries to commit to mitigation actions without linking it to any external assistance. The Copenhagen Accord is practically silent on the carbon market and the future of the clean development mechanism (CDM) of the Kyoto Protocol. Industrial countries have never been sympathetic to India's idea of controlling carbon emissions based on per capita targets. They prefer targets based on reductions in total emissions by developing countries, comparable or equivalent to those undertaken by them.

The climate change has the potential of redefining the whole concept of development. Even amongst those who fully agree on the need for strong climate change action, there is disagreement over what this will entail. Many believe that the solutions will be largely technological: the world can have similar patterns of consumptions. Others believe that climate change actions will require more than simply technological fixes; it will require a significant redefinition of life-styles, aspirations, and indeed, the very goals of development.

## Review and Verification of Mitigation Actions

The UNFCCC (United Nations Framework Convention on Climate Change) explicitly puts the onus on developed countries to help developing countries in mitigation efforts. But there is now an emerging view amongst developed countries on extending MRV provisions to actions undertaken in developing countries as well. This is on the grounds of enabling more comprehensive information on global greenhouse gas mitigation actions, more information to assess the effectiveness of such actions, and greater recognition of greenhouse gas mitigation actions undertaken in developing countries (Ellis et al 2009). Developing countries, on the other hand, are resisting the application of MRV to them on the grounds that it would be against the spirit of the Bali Action Plan.

The Bali Action Plan links developing countries' nationally appropriate mitigation actions to provision of finance, technology and capacity support from industrialized countries, but the exact legal drafting leaves open to dispute whether and how these actions are to be subject to MRV. India's position was that while actions supported by international finance would be subject to international MRV, unsupported actions undertaken as part of a development strategy would only be subject to domestic strategy.

India's submissions to the UNFCCC have argued that review and verification of mitigation actions undertaken by developing countries should apply only where transfers of finance or technology between a developed and developing country partner are involved. In such cases MRV procedures would vary across contractual agreements depending on the requirements of the parties involved. Moving to a low carbon growth path poses technological challenges for India.

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## Technology Transfer and Climate Change

Development, deployment and transfer of environmentally sound technologies for adapting to and mitigating climate change are essential components of comprehensive global efforts aimed at addressing climate change. Though this understanding of the pivotal role of technology, development and transfer is incorporated in the Bali Action Plan, the uptake of climate-friendly technologies, particularly in developing countries is limited by the access to technologies, their high costs, and inadequate capacity to manage, implement and maintain these technologies.

Technology transfer is the process of sharing skills, knowledge and technological breakthroughs among governments and other institutions to ensure that scientific and technological developments are accessible to a wider range of users. Technology transfer are an effective and comprehensive approach for dealing with climate change, because international cooperation on both greenhouse gas mitigation and adaptation must involve transfers of technologies or dissemination of knowledge.

Technology transfer lies at the core of mitigation for climate challenges. However, there seem to be no clear mechanisms to enable technology transfer as yet. The energy efficient technologies are vital to mitigate climate change. TERI (The Energy and Resources Institute) experience shows that to achieve that goal, small and medium enterprises (SMEs) need specific technology development support. The SMEs contribute around 45% of manufacturing output, 40% of exports, and employ more than 40 million people. SMEs mobilize local capital and skills, and thereby provide the impetus for growth and development, particularly in rural areas and small towns (Girish Sethi, 2009: 35)). The large proportions of Indian SMEs remain isolated from modern technological developments and continue to depend on obsolete, inefficient technologies. Many of the SMEs use low grade fossil fuels or biomass for energy, using inefficient technologies. This leads to wastage of fuels; it also results in release of greenhouse gases and particulate emissions.

It is clear that new technology has a critical role to play in the mitigation of greenhouse gases, notwithstanding the uncertainties that surround issues of technology transfer. The profit-motive behaviour of developed countries and their industrial enterprises by the imposition of stringent intellectual property rights regime covering technologies relevant to low-carbon emission will amount to the practice of inequity and double burden on developing countries.

The negotiations should therefore not use the threat of trade sanctions as a tool to force cooperation, as these tend to alienate developing nations (Arvind *et. al.,* 2009: 48). Instead, as Nicholas Stern, former chief economist of the World Bank, has proposed, participation and compliance should be secured through transfers of finance and technology-particularly since most developing countries see climate change as a problem caused by emissions from the industrial world (Stern, 2009).

The main challenges with regard to transfer of technology are likely to persist, since most such transfers are in the private domain. The commitment on IPR protection made by developed countries to their domestic industrial enterprises will make consensus on transfer of tech-

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nology mechanisms difficult to achieve. However, cooperation on development of new technology and its diffusion among developing countries, with facilitation from developed countries is a route that has more to offer.

## India's Export Vulnerability

The export profile gives an idea that of the vulnerability that Indian exports face if the developed countries impose trade measures. Using export data from the Directorate General of Foreign Trade (DGFT), we find that the iron and steel, chemicals, cement, paper and aluminium, accounted for 17.9% of India's total exports in 2007-08. Of these, the two main products, chemicals and iron and steel, account for 9.6% and 7.27% respectively. The other energy products accounted for less than 1% of India's exports. An examination of the total export markets for chemicals and iron and steel reveals that US is the largest market for these items. The US accounted for 14.7% of India's exports of chemical products while it accounted for 16% of India's exports of iron and steel (Purnamita *et. al.,* 2009:33). These exports can face hardship if developed countries, especially the United States impose trade measures in the name of environmental performance and clean development.

## India's Negotiating Position in Climate Change Talks

India is the world's fourth largest economy and fifth largest greenhouse gas emitter, accounting for about 5.1% of global emissions. India's emissions increased 65% between 1990 and 2005 and are projected to grow another 70% by 2020. On a per capita basis, India's emissions are 70% below the world average and 93% below those of the United States. As in many other countries India has a number of policies that while not driven by climate concerns, contribute to climate mitigation by reducing or avoiding greenhouse gas emissions.

While India's GHG emissions are relatively low at this point (especially its per capita emissions), India's increasing use of coal is being viewed with concern by industrialized countries, which are demanding emission mitigation from India, despite their seeming inability to curtail their own emissions. Although India is on strong moral grounds in rejecting immediate action and the Indian Prime Minister has guaranteed that India's per capita emissions will never exceed the industrialized country per capita emissions, the pressure on India and other developing countries is intensifying and at some point, may be even sooner rather than later, India will need to take actions to significantly modify the trajectory of its GHG emissions. India has already enacted a range of policies regarding energy efficiency that have led to changes in the energy and carbon-emissions trajectory of the country.

India's current official stance is that no negotiations are possible without addressing the egregious issues due to the historical burden placed on poor countries by industrialized countries, who have not only been the main contributors to the existing stock of greenhouse gases, but continue to emit at per capita rates that are manifold that of a poor country, like India. India's official position is based on the principle that long term convergence of per capita emissions is "the only equitable basis for a global compact on climate change". India's stance on climate change include: full costs of procuring technology; guarantee on foreign direct investment for technologies; global public investment to leverage a market for new technologies; costs of compulsory

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licensing and other intellectual property rights (IPR); costs to be taken care of; and all funding and technology issues to be handled through the UN treaty and not through the World Bank or other agencies. India has also asked rich countries to contribute 0.5% of their gross domestic product (GDP) towards an adaptation fund for poor countries.

In Asia, after China, India is the next largest source of emissions among the "emerging economies". However, India has crafted a National Action Plan on Climate Change (NAPCC), which provides the road map for India's climate change policy. Specifically, it lays out eight national missions as the way forward: national mission for solar energy, energy efficiency, sustainable habitat (public transport, building codes, etc.), water, Himalaya ecosystem, green India (afforestation), sustainable agriculture, and strategic knowledge.

India (as a developing country) has had no obligations for emissions reduction under the Kyoto Protocol, but this is not likely to be accepted after 2012 when the present treaty ends. There is justified pressure on India to put in place some measures to curb a rapid rise in emissions of GHGs. While the National Action Plan on Climate Change may perhaps contain some novel self-imposed mitigation strategies and measures, it is clear that India's emerging economy demands more energy (power generation, much of it coal-based). The further industrialization of agriculture and new lifestyles have accelerated the demand, which means more emissions with less control in near future.

## Negotiating for a New Legally Binding Instrument

The intergovernmental negotiations under the auspices of the UN Framework Convention on Climate Change (UNFCCC) have totally failed to achieve a desired result. There are a range of popular opinions in favour of an integrated legal form of new instrument that must have a binding force. The new instrument may either replace or supplement the Kyoto Protocol. Japan, Australia, New Zealand, and Canada have expressed a preference for a new legally binding instrument that replaces the Kyoto Protocol. South Africa, Tuvalu and Costa Rica have argued for an agreement that supplements the Kyoto Protocol (Lavanya Rajamani, 2009:20). The precise obligations that India and other developing countries take, as part of new legally binding treaty, are a matter for negotiations. India could negotiate in agreement in which the Bali Action Plan between industrialized country commitments and developing country actions is maintained and which contains legal obligations which are both different in character and stringency to those of industrialized countries, as well as tied to and conditioned on the provision of support. A shift on legal form does not entail a shift in the substance of India's position on differentiation (Lavanya Rajamani, 2009:21).

## CONCLUSION

Climate change is real, and developing countries are more vulnerable to its impacts. It is therefore in our own interest to promote policies where total greenhouse gas emissions worldwide decrease, if we are to stabilize climate at reasonable acceptable levels. This will require drastic decreases in emissions from industrialized countries and some commitment from developing countries. As a large country with an emerging economy, India can take a proactive position to make this happen. Given many complex challenges that climate change poses, responding to it will involve restructuring economies

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and ways of life, mobilizing new technologies, creating innovative systems of finance, and perhaps even new political and institutional arrangements.

Insisting, quite correctly, on the historic responsibility of the advanced industrialized nations in mitigating the effects of climate change, Indian policy has been tardy in recognizing its role in mitigating actions. While fighting for their justified share of carbon space, it is clear that developing countries need to acknowledge their own responsibilities as distinct from advanced industrialized nations. India should take a lead in promoting a legal form of obligations that not only preserve differentiation on equity basis, but also promotes an environmentally effective global process that protects the poor and vulnerable in India and elsewhere.

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# A JOURNEY OF ELDERLYS' RIGHT FROM INTERNATIONAL TO NATIONAL REGIONS: An Overview

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**ABSTRACT**

Ôld people make important contribution to their family, society and the nation and because of this , they enjoyed an important and respectful position in the Society and their family from the ancient times, but in the present days under the drastically changed social set up and changed circumstances due to various reasons, all over the world the elderly people are facing great hardship, health hazards and neglect from their children. They have become vulnerable and are subjected to different types of abuses. The time has come to initiate suitable measures to safeguard their welfare and improve their condition of life and to revive old traditions of culture where they lived dignified life. The UN General Assembly in 1991 had resolved the Principle of Older Persons to safeguard the interest of elder persons. In 2010, the U.N. General Assembly had constituted a working group to suggest the ways and means for the protection of the human rights of the aged persons. Under the Indian tradition, highest regard is paid to the mothers and father as god and goddess, but this precious tradition is fading away. Let us all resolve to bring back happiness on the wrinkled, depressed and gloomy faces of the elderly people.

**Key Words :** Aged People, Old Tradition of India, Rights of Senior Citizens.

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## INTRODUCTION

'Old is gold' holds true for humanity from the very onset of human civilization. The old people, with their long rich experiences, make important contributions to their family, society and the nation at large. It is because of this that they enjoyed and still enjoy, to a certain extent, an important and respectable status in the family. They even equated them with gods and goddesses. The old father and mother, particularly received the highest regard and respect by their sons, daughters and other family members and the society.

The materialistic approach to life, population explosion and wanting resources in family have multiplied the problems

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for elderly people. Further the disintegration of values in family, increasing do's and don'ts for the young members, and similar tendencies have put the position of the elderly in a precarious state and thus the foundation of society around the world has almost shaken. They, being the vulnerable class of society, are subjected to different types of abuses mostly by their dear and near ones. This included, for example, physical, mental, financial, sexual, neglect and social isolation. Their miseries do not end here. They are further added by a large number of diseases like heart attack, urinary and orthopaedic problems, diabetics, deafness and what not. All these factors, it is said, have made the elderly persons a burden and a neglected class in the family and society. It is a period of crisis over the identity of the elderly persons. Since every body has to become old one day. This has raised an apprehension in the mind of the present younger generation a crisis of growing old sooner or later.

In such a sad state of affairs, the question is : how to revive the old tradition, culture and civilization to bring back in their lives a dignified position? One answer can be, the international and inter-nations communities and the individual nations must come out with a right based system for the elderly persons to protect and safeguard their interests, and improve their condition. Unfortunately not much research work has been done in this field. The present writer makes an humble attempt to see an overview of the journey from international to inter-nations relations, from comparative constitutional contributions to India's approach in the recognition of the rights of the old persons. It will try to see where the above journey succeeded in planting a nascent plant of the rights of elders and where they and their caretakers failed. In case, it is proved that they functioned well then what further improvement can be made. And if they or any of them have faulted then what remedies may be provided, are the questions of present examination. The present researcher will also try to find out whether in the varied approach, can any uniform system be developed?

In order to examine the above questions, the present study will look into the different Conventions and Declarations to find out how the right is protected and safeguarded and what changes the right has seen in the changing international and inter-nations relations? Has the inter-nations regions given any thing more than what the international community has given? In this regard what is done and remains to be done is to be examined with a perspective to make the position more better. In the world constitutions, there are a few that have guaranteed a specific right to the elderly persons and many have yet to open their accounts. What has been the approach of the right based constitutions, have they fully secured the rights, have they guaranteed supporting rights to make the right of elders effectively functional? It all warrants a detailed study. In examining these constitutions, a further attempt will be made to find out a common point programme in this connection. The discussions will also continue to find out India's contributions in this long journey. The paper will

end with pointing out the successes and hurdles in the entire journey and also an answer to the question : from here where will we now go?

## International Perspective [1]

The journey of Human Rights starts with the UN Charter, 1945 wherein article 55(1) talks about the human rights and fundamental freedoms for all which should get universal respect for, and observation of without any distinction of race, sex, language or religion. The human rights and fundamental freedoms are not limited to 'citizens' but is of 'all persons' or 'all individuals', an expression which has been repeatedly used in other Declarations or Conferences, making enjoyment of such rights available to one and all. Unfortunately in this tall claim, the discrimination on the ground of 'age' is missing. Thus at the very start, the care for the age olds did not attract the attention of the United Nations. The important subsequent Declarations/ Conventions, for example, Universal Declaration of Human Rights, 1948, International Covenants on Civil, Political Rights and also on Economic, Social and Cultural Rights, 1966, do not specifically talk about the right of aged people. It is interesting to note that the international community took special cognizance of the rights of, for example, women, child, mentally retarded persons, disabled persons, indigenous people, etc. Thus the United Nations since its inception and down to 1990 hardly showed any concern about the status of older persons.

The Declaration on Social Progress and Development of 1969 in Art. 11, for the first time, started airing voice for the age old. The UN adopted the 1st Plan of Action on Ageing, in Vienna, in 1982 which took nearly a decade for the General Assembly to adopt in 1991. It was in 1991 that the United Nations came out with the Principles for Older Persons.[2] These Principles were evolved in pursuance of the International Plan of Action on Ageing adopted by the World Assembly on Ageing, and endorsed by the General Assembly in 1982. The UN realising the situation of older persons, their increasing population, and better health cost and family strains providing care to frail older persons, the General Assembly resolved in 1991 the Principles for Older Persons : 'to add life to the years that have been added to Life'. This is the first time that detailed principles were provided to safeguard the interests of the older persons.

These Principles no where define who is an older person. It laid down five Principles : Independence, Participation, Care, Self-fulfilment and Dignity. In the first rubrics of Independence, there came the accessibility of food, water, clothing, health care [3], income generating opportunities, appropriate education and adoptable environment. Participation takes care of persons' direct participation in matters affecting them; the third rubrics of Care included access to public health, social, legal services and also human rights and fundamental freedoms.[4] The next is Self-fulfilment which included opportunity to develop one's potential and access to

1 The following information is based on Brownlie's Documents on Human Rights, Ian Brownlie & Guy S. Goodwin Gill (Eds) (Sixth Edi), 2010.

2 *See*, for detailed discussions - Tang Kwong Leung, Taking Older People's Rights Seriously : The Role of International Law, (2008) 20 *Jour: of Ageing and Social Policy,* 99; Lee Jik - Joen, Global Social Justice for Older People :The Case for International Convention on the Rights of the Older People (2005) *Brit Jour: of Social Work, 1.*

3 'Shelter' is missing.

4 'Economically viability is not given any place. The main problem of economically marginalized ageold persons should have been a part of 'Care'.

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educational, cultural, spiritual and recreation resources of the society.[5] In the last Principle in 'Dignity' came live in dignity and free from exploitation and physical and mental abuse. These are simply the Principles to 'encourage governments to incorporate the above Principles into their national programmes wherever possible'. The expression 'wherever possible' makes their application at the mercy of the State Parties. The result has been that these Principles have yet to see the light of the day in large number of world countries. Are not they simply a decorative piece in the International Law? .

An unconcerned approach is further reflected when the World Conference on Human Right at Vienna in 1993 remained blind with the situation of the aged people. Thereafter attempts were made in 1995 when the Committee on Economic, Social and Cultural Rights adopted the General comment no. 6 on the rights of older persons. The Comment provided the 'ways as to how these principles may be applied to the older persons'. For the first time, the Committee came out with the explanation as to why 'age' was excluded as a ground of discrimination. It was pointed out that it was not intentional but 'the problem of demographic ageing was not as evident or as pressing as it is now'. This means that the law will come into existence only when crisis situation arises - a bad analogy for the legal control. This was followed by the Declaration of the International Year of Old Persons in 1999 with four priority areas : the situation of older persons; individual lifelong development; relationship between generation; and interrelationship of population, ageing and development. But International year celebrations have become merely a talk, talk and talk with hardly any much output.

In 2002 at Madrid the World Assembly on Ageing adopted unanimously a Political Declaration and an International Strategic Plan of Action on Ageing. This was an updated and greatly expanded version of ageing. It had a strong focus on the human rights of elderly persons. It envisaged a large number of protections which included, for example, full realization of their rights, elimination of all forms of violence and discrimination, protection of health, and last but not the least, a supportive environment to live. It is submitted that these are tall claims made to improve the lives of the elderly people but with the absence of any monitoring and implementation machinery the States' action in this regard hardly could be effectively controlled. Thus they remain merely a pious hope. [6]

In the continuation of all the above efforts, in 2010, the UN General Assembly constituted on Open-Ended Working Group on Ageing. The Group had before them the target how to strengthen the protection of the human rights for older persons, what are the gaps and misgivings left in their treatment, and what shall be the future shape of instrument and measures for the protection of the age old persons. But the ground reality remained that there was no universal acceptance of any special Convention on the Rights of Older Persons. Some, though in minority, wants a new umbrella, whereas other nations favour existing system to continue. All the above commitments, it is submitted, have yet to give positive results. It has been rightly pointed out while commenting on 'International Scenario 'that, '(O)lder persons are not only unrecognized, but more

. 5 It confines to private resources and exclude governmental resources.

. 6 *See* Contra the UN Secretary-General's Report, 2011 where it has been claimed that since 2002 some good measures have been introduced.

and more excluded from their role in society'. [7] In the light of the existing pathetic condition of the elderly people world over, it is time that the international community must adopt a specific Convention for the ageolds giving detailed rights. Once it is done at the international level then the inter-nations and the nations individually would follow the course.

## Inter-nations Contributions

Apart from the above international developments, the regional levels have also started moving, though slowly, in this direction. The European Union, from time to time, has made important contributions. Though the Human Rights movement was given a shape and reshape from the European Convention for the Protection of Human Rights and Fundamental Freedom, 1950 down to 2007, but it hardly showed any specific concern for the ageolds.[8] However two Documents deserve special attention. First, the European Social Charter, 1961 and the revised Charters which was intended to be supplementary to the European Convention on Human Rights to protect and develop further the human rights. In order to monitor their compliance, the European Committee of Social Rights was constituted. The Additional Protocol of 1988 provides detailed provisions. Article 4(1) guarantees elderly person the right to social protection which shall be provided by the State Parties. The concept of social protection shall include : decent life, active participation in public, social and cultural life and information facilities and opportunities to use them. [9] The other important rights guaranteed under article 4(2) are freedom to choose the life-style, independent life, and also suitable housing and health care. The third category of right is participation in decision-making concerning themselves. [10] Such provisions have also been endorsed in revised social charter, 1996.

The revised European Social Charter, 1996 brought in new rights under its perview which included, for example, protection against poverty, social exclusion, specific rights of women, children, handicapped and workers but this Charter misses the rights of the elderly persons. This supports the theory that the European Union was not specifically much concerned with the interests of the elderly person.[11] The European Union of Fundamental Rights, 2000, divides the fundamental rights into rights of citizens and persons, and guarantees the right of dignity, equality and solidarity. Under the cluster of right to equality in article 25 of the Charter, it specifically guarantees the rights of the elderly persons which include the right to live in dignity, independence and participate in social and cultural life. This is subject to limitations prescribed under article 52 wherein restrictions may be imposed if they are necessary and genuinely to meet the general interest or to protect other's right. And lastly, article 47 guarantees the right to effective remedy before a tribunal in case of the violation of the fundamental rights. This right itself is a part of the Fundamen-

. 7 *See*, Know Your Rights Series : Elderly People, National Human Rights Commission, New Delhi, 18, 2011.

. 8 All these years the rights of women, children, migrant workers national minorities, stateless persons, etc were developed.

. 9 *Art.* 4(1)(a) and (b).

. 10 *Art.* 4(3).

. 11 The Conventions coming into force after 1996 bear the testimony. *See*, for example, Conventions on Nationality (1997), Children (2003), Trafficking (2005), Statelessness (2006) Children Sexual Abuse (2007), etc.

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tal Rights and the article gives vigour and strength to the fundamental rights guaranteed by the Charter. Another important development in the Charter of 2000 is that article 21 prohibits discrimination on the grounds of, inter alia, 'age' also. Thus in case the aged persons are discriminated, they can claim protection of this article. It is suggested that all Declarations dealing with discrimination must include 'age' as one of the ground which is generally missing. How far such fundamental right is adequately protected and effectively enforced, the literature do not give any sufficient answer. [12]

Herring[13] in his work, Older People in Law and Society, has tried to take the help of the general rights guaranteed in article 3 and 8 of the European Convention on Human Right. They guarantee prohibition against torture, inhuman and degrading treatment and the right to respect family respectively. Herring forgot to touch upon articles 2 and 14 which are also relevant which guarantees the general right to life and prohibition of discrimination where unfortunately the ground of 'age' is again missing.

Coming to Americas, their history starts with the Declaration of the Rights and Duties of Man, 1948, a male dominated document, provides a large number of general rights, for example, right to life, liberty and security of his person (Art. - I); right to equality (Art - II); right to health (Art. XI) and many more but no specific mention is made of the protection of the elderly person. It is only in the Additional Protocol to the Convention on Human Rights in the Area of Economic, Social and Cultural Rights, 1988 that the elderly persons have been given a space. Article 17 which guarantees every elderly person the right to special protection. A corresponding duty is imposed on the State Parties to take progressive steps necessary to make the right a reality and, in particular, provide suitable facilities like found and medicare to those who lack them and also unable to provide; engage them in productive activity suited to their abilities; and encourage social organization to help them the improve the quality of life. It is difficult to say how far the rights of elderly person can become a 'reality' in the Americas. The answer cannot be positive.[14] An apathetical approach is also reflected from variety of Documents which mainly dealt with torture and death penalty (1985, 1990) violence against women (1994), forced disappearance of persons (1999), democracy (2001), etc. Is it not true that in the capitalist and materialistic world, the old age has been put on the back seat?

**The African Union** - the Organization of African Unity-was mainly entangled in the crisis of abolition of colonialism, apartheid and elevating poverty. Africa mainly concentrated on the refugees (1969), Child (1990), Women (2003) Democracy (2007), Displaced Person (2009), etc. This does not mean that Africa did not pay any attention to the age old persons. It must be said that it has shown more concern than the Americas. For example, the African Charter on Human Rights and Peoples' Rights, 1981, apart from the large number of general rights, confers the aged the right to special measures of treatment keeping with their physical or mental needs.

. 12 *See*, DE Schutter, Fundamental Rights in European Union, 2010; S. Peers & A. Ward, (Eds), , 2004.

. 13 Jonathan Herring, Older People in Law and Society, 191-194, 2009.

. 14 *See*, for example, N.P. Engel, et al, (Eds) *Protecting Human Rights in the Americas* (4th Eds) 1995; D. Harris & S. Livingstone, (Eds), *The Inter-American System of Human Rights,* 1998.

A corresponding duty is also imposed on State Parties and particularly the individuals to not only respect his parents at all times but also to maintain them in case of need.[15] In case of aged women, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 2003 takes special care of the status of the elderly women. Article 22 provides special protection of elderly women and the State Parties are required to provide special protection to them commensurate with their physical, economic and social needs as well as their access to employment and professional training. Further, the State Parties shall ensure security of their person against violence, discrimination based on age and right to be treated with dignity. To make these rights meaningful, the right to judicial remedies against the violation of right is also ensured under article 25. In how many cases the judicial remedies were activised and what has been the success rate has yet to be clearly identified, a lucrative field for the research scholars.

In Arab and other Islamic States, the human right movements has been moving with a snail pace. However, from time to time regional and international conferences were hoisted on human right movement. [16] Two Documents need mention : the Cairo Declaration on Human Rights in Islam, 1990 and the Arab Charter on Human Rights, 2004. But in these documents there has been an insignificant reference to the older person; whereas it provides detailed provisions for different categories of persons. In article 7 of the Cairo Declaration mainly deals with the children's interests, however sub-article (c) provides a vague entitlement of the parents to certain rights from their children. Neither the Declaration specify what rights they can claim from their children nor it refers to those rights which are available in one's personal law. Coming to the Arab Charter, article 33 mainly focuses on family and family relations and a scanty reference is made in article 33(2) wherein, instead of right based scheme, it talks about the duty of the State and society to ensure necessary protection and care for, inter alia, older persons. Again the expression 'necessary protection and care' is very vague giving leeway to the State and society to function. Thus the entire approach of the Arabian nations was not encouraging. The last but not the least, the Asian approach has yet to come out of hibernation for an effective declaration in this regard, inspite of, the fact that the States are parties to the related international treaties.

## Comparative Constitutional Law Vision

There are number of constitutions which have guaranteed the rights of persons and/or citizens but only few have guaranteed rights to the ageold persons. Out of 68 constitutions of the world in Pylee, [17] there are only 12 constitutions which have guaranteed certain rights to the age old persons/citizens.[18] Four Constitutions guarantee the right to senior citizens only[19] and in eight constitutions the right is available to all ageolds. [20] The question

. 15 Art. 29(1).

. 16 For detailed study see, A.E. Majer, Islam and Human Rights : Tradition and Politics, 2006; A. Schedina, Islam and the Challenge of Human Rights, 2009.

. 17 M.V. Pylee, The World Constitutions, Vols 1 and 2 (Third Edi), 2006.

. 18 *See*, for example, Albania, 1988 - Art. 52; China, 1982 - Art 45; Brazil, 1988-230 (1)(2); Finland, 1999-Art 19; Hungry, 1949 Art. 70 E(1); North Korea, 1998- Art. 72; Poland, 1997-Art. 67(1); Russian Fed, 1993-Art. 39(1); South Koea, 1948 Art 67(1) and 68(3); Thailand - Art. 54; Ukraine, 1996-Art. 46.

. 19 *See* China, Hungry, Poland and South Korea

. 20 *See,* Albania, Brazil, Finland, North Korea, Russian Fed., Spain, Thailand and Ukraine.

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is : should the right be available to all? Allowing varies rights/privileges to the foreigners in this regard, would impose burden on economy of the country and moreover, such countries would become an abode for the large scale ageold foreigners to avail the free services. As such, it should be allowed to be enjoyed by the citizens unless there is bilatered treaties amongst the nations in this regard. Those persons who have sacrificed their young age serving the country one way or other, must be given benefits and privileges when the citizens become senior in age. The Constitutions do not clearly spell out the contents of the rights of the ageold; though majority put emphasis on the right to social security.[21] Further, what system of social security shall be available, is not spelt out by these Constitutions. However, the Constitution of Ukraine allows extending such right to right to social insurance and pension.

The elderly persons, mostly, require two rights : first, the public health; and second, the economic security. The Constitutions of Poland, North Korea, Spain, for example, guarantee right to public health and medi-care. North Korea goes further ahead and guarantees free medical services with expanded network of hospitals, sanatoria, and other medical institutions with a corresponding duty on the State to make available the right. China imposes such duty on the society whereas, Spain focuses the liability of family also.

The large number of the Constitutions have left the caring of the rights to the society and family. In the materialistic life how far the society and family will protect the elderly persons is a doubtful proposition. Moreover, world over the concept of family - father, grand-father and other members of family living together - is disintegrating or already disintegrated. In their young age the senior citizens have, in one way or other, contributed to the social and national development. Why cannot the State then take care of those who are left out? Apart from these rights, the right to dignified life[22] right to material assistance[23] are ensured to make available the basic subsistence ;[24] right to financial aid to those old people who are either incapable of earning livelihood[25] or have insufficient income .[26] The Constitution of Brazil guarantees extended right to free transport, which is very important as a part of the right to movement. Ukraine has gone further than the other Constitutions, it guarantees standard of life not below that of the common standard of living.

The large number of the Constitutions have no restrictions on such rights. Thus making the right absolute which in reality could hardly be allowed as perfect enjoyment. Some Constitutions have used expressions like, 'prescribed [27] 'system of law[28] 'provided'[29] or 'established by law' [30]? These expressions give a free hand to the Legislature to tailor such rights as per its necessity, thus diluting the fundamental character of the rights.

Further, none of the Constitutions define

21. *See* Albania, China, Hungry, Poland, Russian Fed. and Ukraine.
22. *See*, Brazil
23. *See*, North Korea
24. *See*, Finland.
25. *See*, South Korea.
26. *See*, Thailand.
27. *Ibid.*
28. *See*, Albania
29. *See*, South Korea.
30. *See*, Russian Fed.

who is an ageold person except Thailand whose Constitution clearly defines it, as a 'person who is over sixty years of age'. As the life span has increased throughout the world, the present prevailing old age concept of 60 - 65 needs to be increased and be defined accordingly. This will allow persons in the brackets of 60-65 continue to successfully contribute with their vast rich experience. Secondly, the Constitutions hardly provide enforcing and implementing constitutional mechanism which again lowers down the rights' fundamental character. It is time that the world constitutions must be activised in these directions so as to do judicious justice with such haven'ts of the rights. It may be pointed out that the US Constitution does not specifically include such right but it is one of the countries of the world which has a developed ageold law, where even lawyers and academics are actively contributing. [31]

## Indian Approach

India, 'that is Bharat', was a country known for its tradition culture and civilization. One of the important tradition was, which is still prevalent in many families, that a great concern, respect, love and affection was shown to the ageolds by not only the family members but also the society. No body can forget the devotion shown by Sri Ram, Bhishma, Sravan to their old parents? In this tradition it is said, 'मातृ देवो भवः पितृ देवो भवः' giving highest status to mother and father as god and goddesses. Even on their birthday, people wished the elders, 'those~जीवेम् शरदः शतम्। In the present time those old precious tradition and culture have withered away and one can see now, in many 'cases', their lives have become almost a chattel's life. There were large number of cases of bodily harm, torture, humiliation, insult, malnutrition and over and above all these, the heinous act of throwing one's old parents out of their own house.[32] The support to the above sad tragedies comes from the fact that in the year 2012, 974 elderly persons called on the Helpage Foundation and 6129 approached the National Human Rights Commission for help.[33] There are cases reported of even suicide committed by the oldage victims. [34]

**Part III -** Fundamental Rights in the Constitution of India, guaranteed varieties of rights under articles 14 to 32 there are general rights available either only the citizens or to all persons. There are also specific rights in favour of children, women, accused, persons detained under preventive detention, forced labourer, religious persons, person belonging to minorities and certain castes and classes. But in this tall claim, the older people have not been given any specific place in this Part. Thus the Constitution of India, as compared to the other constitutions, structurally remains blind to date in this regard. It is interesting to note that there were in all thirty-five Amendments made in Part III to further shape and re-

. [31] *See*, for example, R. Sahwartz, Law and Ageing, 2004; L. Frolik and R. Barnes, Elder Law : Case and Materials, 2003; A. McDonald and M. Taylor, Older People and the Law, 2006.

. [32] *See*, for example, Mr. Mohan Jena's Statement in Lok Sabha - Lok Sabha Debates, Dec. 5, 2007. The Hindu (National) - Human Rights of the Old at Stake, Aug 10, 2013; A Helpage India Report on Elder Abuses in India', 7, 15, 2012.

. [33] Study on Legal Provisions and Practices with Special Focuss on Human Rights of Old Persons, The Hindu Aug 17, 2012. The statistics given by the Min. of Statis & Progr. Imple., Govt. of India, in Situation Analysis on the Elderly in India, June, 2011 and also the Report of the National Human Rights Commission in Known Your Rights Elderly People, 2011, unfortunately do not throw any light on the case of miserable lives lived by the elderly people.

. [34] A. Venkoba Rao, Suicide in the Elderly, *India Jour of Social Psych* 7, 3-10, 1983. A Venkoba Rao and T. Madhavan, Depression and Suicide Behaviour in the Aged, 25 *Ind. Jour. of Psych,* 251-259, 1983.

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shape the fundamental rights but even in these exercises unfortunately, the right of elderly person could not get any specific place. Thus even after sixty-five years of the commencement of the Constitution of India, its written part remains far behind the world race in this direction. Further, though there was a specific scope to safeguard the ageold persons interests, the constitutional provisions with prohibition against discrimination in articles like 15(1), 16(2), 23(2) and 29(2), missed the ground of ' age' in these articles. This will mean discrimination on the ground of age was permissible.

It is interesting to note that even in absence of any specific right of elders' in the Constitution, the high courts and the Supreme Court of India have given a relief to the elderly persons under articles 14 and 21. For example, the Calcutta High Court[35] took a serious cognizance of the inaction of the police authorities. The Court, it may be pointed out, issued detailed directions to the police authorities to protect their right to life and property guaranteed under article 21 and 300A respectively. In the *Sudhir Kumar case* [36] the high Court directed the police authorities to keep strict vigilence on the age old victims and protect their life and dignity. The right to get family pension was treated as a part of fundamental right provided in article 21.[37] When the retirement benefits of the senior citizens was unduly withheld for four years, the apex court took the stand that such action attracted the provisions of articles 19(1) and 21. [38]

The Supreme Court, in its concern to protect the interests of the elderly persons even went to the extent of applying of the principle compensatory discrimination against an insurance company which adopted the same process for the renewal of the policy in case of all customers including the aged. The Supreme Court took the stand that if no different treatment was adopted in their case, it would attract article 14.[39] Further, the Supreme Court has time and again expanded the scope of article 21 to include the right to food, shelter medi-care and dignified life for every person.[40] which could also be claimed by the ageds as well. Thus the Indian judiciary, in the structurally blind constitutional vision in this regard, did not leave any opportunity to reflect its concern for the elderly persons. [41]

It may be pointed out that Parliament, through the Maintenance and Welfare of Parents and Senior Citizens Act, 2007, has guaranteed some statutory rights to the elderly persons which include, the right to maintenance, medi-care, and security of person and property. A welcome approach

. [35] *Kalpana Pal v. State of W.B.*, in WE No. 3915 (W) of 2010. See also *Renuka Bala v. State of W.B.*, WP No. 22614 (W) of 2010; *Jaya Rani v. State of W.B.,* WP No. 13564(W) of 2009.

. [36] *Sudhir Kumar v. State of W.B.*, WP No. 22614 (W) of 2009.

. [37] *K.K. Mastan v. G.M.S.C. Rly*; (2003) 1 SCC 184. See also Sukh Deo v. State of A.P., AIR 1986 SC 991.

. [38] *S.K.Dua v. State of Har*. (2008) 3 SCC 44.

. [39] *United Indi Insu. Co. v. Manubhai Gajera. For application of article* 14, see also *Prabhakar Rao v. State of A.P.*, AIR 1986 SC 210; *Indian Council for Legal Aid and Advice v. Bar Council of India* (1995) 1 SCC 732 even senior citizens were allowed to enrol as an advocate. See contra *Union of India v. Shankarlal* (2010) 12 SCC 563 where what concessions should be given to the old age citizens the apex court, unfortunately took the stand it is not for the Court to interfere with.

. [40] See, *Chameli Singh v. State of U.P.*, AIR 1996 SC 1051; *Ashok Kumar v. Union of India*, AIR 1997 SC 2298.

. [41] In recent time the Legislature through different and specific laws and the judiciary while interpreting them have evolved certain principles and safeguards and statutory rights which is a barren field for the research scholar to make contribution in the development of the ageolds' law.

but it has yet to give positive results.

Thus in India, the Constitution has yet to guarantee any specific constitutional fundamental right to the older persons rather it adopted a discriminatory approach with the age olds. The world's largest Democracy, with a tall claim of Fundamental Rights unfortunately remains constitutionally blind in this regard. In view of the population explosion, and their abuses, a specific detailed fundamental rights of the senior citizens is an urgent demand of the time.

## CONCLUSION

It is a fact that today there is an explosion in population of aged persons throughout the world, the difference may be of degree. In such a situation no body should afford to sit idle and allow many more millions of elders to suffer from all sorts of abuses and allow the situation go beyond control. In such a crisis one solace may be to adopt a right based effective system at all levels to add to the efforts to bring back the yester century's tradition and culture of dignified life for them. It will be a tool against harassments, ill-treatments, brutal assaults and all types of elders' abuses. The demand of the present time is that as they are still human being and, therefore, they should be allowed to live a life enjoyed by other persons or citizens in the country.

Starting with the international community relationship, some movement is visible but still a specific effective right for the older person remains a dream in the international relations. The result is that such a non-concerned approach has percolated down from the regional to national levels. However, in this gloomy situation, the State Parties must provide participation, care, self-fulfilment and dignity. At the regional level, the European Union, in particular and also the African Unity have moved a step forward. On the contrary the Americas moved with a tortoise speed and Asia and Pacific region and Arab and other Islamic group have yet to care seriously for the rights of elders. Such unconcerned and casual approach, it may be pointed out, has also reflected in the action or inaction of the Member nations.

At the ground level journey, the comparative constitutions followed a zig zag way. But it may be appreciated that as compared to the international and inter-nations' snail speed, the individual nations have moved two steps forward. However the sad part remains that many of them still remain in hibernation. Each nation has adopted its own right based system, giving varied models with many components still missing. The right further remains skelton for the non-inclusion of clear cut restrictions and also an enforcing machinery. The comparative constitutional law right based system must see that the system is now made active and productive. The countries which are still sleeping over the matter, the international and inter-nations pressure must awake them before it is too late.

India is, in most cases, transformed from a country with ancient culture and traditions, giving a high status to the senior family members, to, in many case, a nation where the elders are treated as a burden, neglected and abused class of persons. The tragedy further continues as the Constitution of India remains blind in this regard and there has been a reluctance on the part of the senior citizens to knock the doors of the courts. In such a gloomy picture, the approach of the judiciary may be appreciated for protecting their rights whenever the opportunity came before it.

So what should be the agenda? First the

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United Nations must come out with the Declaration on the Rights of elderly persons as it has done in case of other persons. The regional groups must rise and effectively protect their interests by extending the privileges, benefits to enjoy life like the other citizens. The Constitutions of the world which are still in hibernation, the international community and the regional groups must bring pressure on them so that they rise on the occasion. Further in the varied approach in the Constitutions, a detailed specific rights of elders with restrictions, enforcement machinery and an overall monitoring agency must find a place. This will help the elders to enjoy a dignified and non-discriminatory life, instead they are left to die silently. The individual nations must see that the rights are not only available but they effectively enjoy the fruits. This in turn will require an all out efforts by the NGOs, caretakers and all the stakeholders. There is a need of an 'Ombudsman to watch and monitor the progressive approach of the nation.

Let all of us resolve to bring back happiness on the wrinkled, depressed and gloomy face of the elderly and this will be a great service to the humanity and also fulfil our commitments : Let every body be happy - 'सर्वे भवन्तु सुखिनः'

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# CONSERVATION OF WETLANDS AND LAKES : AN INDIAN LEGAL PERSPECTIVE

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ABSTRACT

Lakes and wetlands, the national heritage, hold special significance in the lives of human beings and other creatures besides having economic value. Wetland constitute 6.4% of earth's surface and serves various functions such as flood control, nutrient absorption, sediment retention, erosion control and provide habitat for variety of species of flora and fauna. However, continuous assault on the wetland and lakes make them shrink and disappear leading to flood and water insecurity. Harika lake, a wetland formed downstream of the confluence of Beas and Sutlej rivers in Punjab – recognised as Ramsar site in 1990 – has been reported to shrink to two-thirds of its 41 sq km area in the last 13 years. Some of the wetland sites namely; Loktak in Manipur, Chilka in Odisa and Wulur in Kashmir, designated as sites of International importance under Ramsar Convention have been the victims of uncontrolled development and encroachments.

**Key Words :** Wetland, Lake, National Heritage, Ramsar Convention of Iran, Shrink, Encroachment, Urbanization and Conservation.

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## INTRODUCTION

Lakes and wetlands,[2] the national heritage, hold special significance in the lives of human beings and other creatures besides having economic value. They are among the most biologically productive habitats in the world. Wetland constitute 6.4% of earth's surface and serve various functions such as flood control, nutrient absorption, sedi-

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[2] Wetlands are areas of land where the water level remains near or above the surface of the ground for most of the year and include ponds, tanks, canals, creeks, water channels, reservoirs, rivers, streams and lakes etc.

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ment retention, erosion control and provide habitat for variety of species of flora and fauna.[3] Translated into economic terms, they are the key attractions of tourists, supply raw materials for paper or basketry goods and fisheries.

However, continuous assault on the wetlands and lakes make them shrink, disappear leading to food and water insecurity. These wetlands are facing serious problems of environmental degradation due to various factors, viz. increasing population, waste water from domestic and industrial effluents, increasing tourist pressure, demand for fresh water, and developmental activities. It is one of the irony that we, the human beings, have the ability to mould environment to our needs so as even to the extent of destruction and on the other hand we claim safe, unpolluted, and healthy environment. Following few case studies bring out the present status of wetlands and lakes in our country.

Harike lake, a wetland formed downstream of the confluence of Beas and Satluj rivers in Punjab-recognized as Ramsar site in 1990-has been reported to shrink to two-thirds of its 41 sq km area in the last 13 years. Some of the wetland sites namely; Loktak in Manipur; Chilika in Odisha, and Wulur in Kashmir, designated as sites of international importance under Ramsar Convention have been the victims of uncontrolled development and illegal encroachments. Recent studies reported [4] that one-third of country's wetlands have already been wiped or severely degraded. The plight of unreported wetlands is much worse, not a single wetland has been spared. For instance, in Bangalore out of 262 lakes only 10 hold water now; 65 of Ahmadabad's 137 lakes have already been converted to developmental sites and most of the water bodies identified in Delhi (625) exist on paper only. [5]

The above state of affairs relating wetlands and lakes paints a quite gloomy picture so far as their conservation and management is concerned. The Vembanad Lake, declared as a Ramsar site in 2002 and a Critically Vulnerable Coastal Area (CVCA), situated in the state of Kerala, supports exceptionally large biological diversity and constitutes second largest wetlands in India. It also plays an important role in the ecology and economy of the state. It has immense conservation importance as it supports a large aquatic biodiversity and the most important migrating bird's habitat besides of most important migrating bird's habitat besides of the fin, shell-fish and a nursery of several species of aquatic life. Shrinkage of lake as a result of land reclamation (5.21 acres) is reported to be undergoing severe environmental degradation due to increased human interventions through developmental activities. [6]

In yet another case, [7] the Punjab State Government had acquired hilly area measuring 6172.09 acres of Sukhna

[3] *See*, Gaurav Garwa and Govind Ram Meena, Conservation of Lakes: Legal Solutions in Sengupta, M. and Dalwani, R. (Editors). 2008; Preceedings of Tall 2007, p.1149

[4] Sudhirendra Sharma, The curious case of disappearing wetland, in Hindustan Times, dated 01.02.2014,p.8

[5] *Ibid*

[6] *See*, for details, *Vaamika Island (Green Lagoon Resort) v. Union of India*, (2013) 8 SCC 760.

[7] S.S. *Brar & Ors. v. Union of India and Ors.*, (2013) 1 SCC 403.

lake catchment for carrying out soil conservation works to reduce the silt in-flow into the lake. However, the area so acquired was later to be urbanized and accordingly, it was pointed out that it would lead to degradation of habitat and disturb migratory birds which come every year to Sukhna lake. Also that permitting urbanization next to Sukhna lake is likely to be a death knell for the precious wildlife. The land proposed to be acquired falls in the ecologically fragile green belt along the Sukhna lake.

The above scenario compels us to understand the reasons for the present state of affairs concerning conservation and wise-use of wetlands as an international commitment at Ramsar. The factors for such oversight may range from lack of resources and ambivalent political interest amongst the agencies responsible for wetland protection and conservation to the vast number of multiple users and economic interest attached to these wetland ecosystems as well as the varying geographical characteristic and diverse range of wetlands in our country. Also lack of accurate scientific information [8] and multiple bodies of decision makers, created under number of laws applicable to wetlands[9] may be another factor for the neglect. This paper, accordingly, seeks to examine the existing legal framework both at international and national level and also briefly scrutinizes the steps taken by the Executive and Judiciary in conservation of lakes and wetlands in India.

## International Law developments : A Bird's Eye - View

At the international level, the Convention on Wetlands of International Importance especially as Waterfowl habitat was signed in Ramsar, Iran in 1971.[10] The main aim of the Convention is '*to stem the progressive encroachment on and loss of wetlands now and future*' and *'to support wetland conservation by combining foresighted national action*.' The Ramsar document defines wetlands as, "*areas of marsh, fen, peat land or water, whether natural or artificial, permanent or temporary, with water that is static or flowing, fresh, brackish or salt, including areas of marine water the depth of which at low tide does not exceed six metres*." [11] This definition includes diverse habitats ranging from mangrove swamps, peat bogs and coastal beaches to tidal flats, mountain lakes, tropical river systems and even coral reefs. The con-

[8] Although the "precautionary principle"—one of the principles of international environmental law under Principle 15 of the Rio Declaration, 1992, provides that "lack of scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation", rather it requires the statutory authorities and the government 'to anticipate, prevent and attack the causes of environmental degradation'.

[9] Discussed later in this paper.

[10] Ramsar Convention is an intergovernmental treaty which provides the framework for national action and international cooperation for the conservation and wise use of wetlands. There are 156 countries as contracting parties to the treaty and 1676 sites are designated under this Convention as Ramsar sites of international importance. (See, *http://www.ramsar.org/cda/en/ramsar-documents-list/main/ramsar/1-31-218_4000_0 last visited on 08.02.2014*). Other important international Conventions, Declarations include; (i) The United Nations Convention on Human Environment (1972); (ii) The Convention on Biological Diversity (1992); (iii) Convention on the Conservation of Migratory Species of Wild Animals (1979) also known as Bonn Convention; (iv) the World Charter for Nature, adopted and proclaimed by United Nations General Assembly on 28.10.1982.

[11] Article 1.1 of the Ramsar Convention, 1971

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vention lays down several measures for conservation of wetlands which may be classified in three broad categories: (i) *Specific site measures* which include 'designating wetlands of international importance and conservation of national parks, protected areas, site planning and participatory management etc.' ;[12] (ii) *Non site measures* include '*integrated planning, environmental permit systems, environment impact assessment (EIA) and environmental auditing including procedure thereof, habitat and species conservation and incentive measures etc.*'[13] and; (iii) *the International Cooperation* for implementation of the Ramsar initiatives, obligations, encourage wetland research and promoting the training of personnel etc,'. [14]

A pertinent question may be raised here as to why does an international agreement address convention of wetlands that presumably lie within national jurisdiction? The answer to the above could be located in the Preamble of the Ramsar document which lists out at least four reasons for such initiative. They are:

- The ecosystem affected by wetlands are often international, lying across the borders of two or more states;
- Waterfowl in their seasonal migrations may cross national borders and are thus an international resource;
- Wetlands constitute a resource of great economic, cultural, scientific and recreational value, the loss of which would be irreparable;
- In coordination with national policies, international action can play an important role in ensuring the conservation of wetlands and their flora and fauna.[15]
- 

It may be noted that the first step, for implementation of Ramsar commitment for conservation of wetlands require listing of sites of international importance. It is alleged that the original listing requirements were quite general and accordingly the new criteria for listing of sites has been prepared by the Seventh Conference of Parties in1999 which require that a wetland should be considered of international importance if it:

(a) Regularly supports 10,000 ducks, geese and swans; or 10,000 coots; or 20,000 waders, or;

(b) Regularly supports 1% of the individuals in a population of one species or sub-species of waterfowl or;

(c) Regularly supports 1% of the breeding pairs in a population of one species or sub-species of waterfowl. [16]

It may be further added here that listing of wetlands under Ramsar document is not permanent. A party may de-list a wetland or change its boundaries in case of an '*urgent national interest*', [17] a term that has

[12] *See*, Article 2 of the Ramsar Convention.

[13] *See*, Article 3.1 of the Ramsar Convention.

[14] For details see, Articles 4 and 5 of the Ramsar Convention.

[15] David Hunter, James E. Salzman, Durwood Zaelke, International Environmental Law and Policy, Foundation Press, 2nd Ed., (2002) pp. 1029-1030.

[16] *Id*, at p. 1030

[17] *See*, Articles 2.5 and 3.2 which reads as under: "Article 2. 5 - Any Contracting Party shall have the right to add to the List further wetlands situated within its territory, to extend the boundaries of those wetlands already included by it in the List, or, because of its urgent national interests, to delete or restrict the boundaries of wetlands already included by it in the List and shall, at the earliest possible time, inform the organization or government responsible for the continuing bureau duties specified in Article 8 of any such changes."

"Article 3.2 – Each Contracting Party shall arrange to be informed at the earliest possible time if the ecological character of any wetland in its territory and included in the List has changed, is changing or is likely to change as the result of technological developments, pollution or other human interference. Information on such changes shall be passed without delay to the organization or government responsible for the continuing bureau duties specified in Article 8."

again not been defined in the Convention. However in such cases the party is required to compensate for any loss of wetland resources and create additional nature reserves for waterfowl and protection of original habitat.

Further the 'wise-use' of wetlands has been permitted under Article 3 of the Ramsar Convention [18] without defining the term. This fallacy has been corrected at the Third Conference of Parties Canada, 1987, which defines 'wise-use' as under:

"*The wise use of wetlands is their sustainable utilization for the benefit of mankind in a way compatible with the maintenance of the natural properties of the ecosystem.*"

"Sustainable utilization" was defined as:

"*Human use of wetland so that it may yield the greatest continuing benefit to present generations while maintaining its potential to meet the needs and aspirations of future generations.*"

The "natural properties of the ecosystem" were defined as:

"*Those physical, chemical and biological components, such as soil, water, plants, animals and nutrients, and the interactions between them.*" [19]

Thus it is noted that at the international level the efforts have continued to ensure conservation and management of wetlands and lakes. The gaps, wherever existed, have been tried to be removed through the Conference of Parties from time to time. Some of the wetland sites, numbering twenty-five in India have been listed as Ramsar sites so far. Thus it becomes pertinent to look at the legal framework available in India for the cause of wetlands.

## Legal Framework at Domestic Level

Pursuant to the Ramsar commitment, the Government of India, Ministry of Environment and Forests, issued the Wetlands (Conservation and Management) Rules in the year 2010. However, it would be inappropriate to presume that there were no laws prior to these rules dealing with conservation and management of wetlands and lakes in India. The laws that were and are in force include: the Constitution of India, and various Rules notified by the Central Government under the Act(s), viz. the Wildlife (Protection) Act, 1972, the Indian Forests Act, 1927, the Forest (Conservation) Act, 1980 and the Water (Prevention and Control of Pollution) Act, 1974. The above laws are briefly discussed herein under:

### Wetland Conservation and the Constitution of India

The Constitution of India, a fundamental law of the country and a dynamic document enshrines adequate provisions for safeguarding lakes and wetlands. [20] However, often an allegation is made against the Constitution that it was enviro-blind at the commencement and rightly so be-

[18] Article 3 reads as under: *"Article 3 - 1. The Contracting Parties shall formulate and implement their planning so as to promote the conservation of the wetlands included in the List, and as far as possible the wise use of wetlands in their territory.*

*2. Each Contracting Party shall arrange to be informed at the earliest possible time if the ecological character of any wetland in its territory and included in the List has changed, is changing or is likely to change as the result of technological developments, pollution or other human interference. Information on such changes shall be passed without delay to the organization or government responsible for the continuing bureau duties specified in Article 8.*" It may be pointed out that 'wise-use' as a concept pre-dates to Stockholm Conference which is closely linked to sustainable management of wetlands and lakes.

[19] *Supra*, foot note 15, at p. 1036

[20] Article 31-A of the Constitution of India permits the State to acquire wetlands for public purpose read with entries 17-A & B of the Concurrent List of the VII Schedule power for protection of wildlife & forests through legislation.

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cause the Constitution (42nd Amendment) Act, 1976 has added a green eye by inserting Article 48-A as one of the State's obligations for protecting and improving the environment and to safeguard the forests and wildlife of the country. [21] Also a fundamental duty has been imposed upon 'we - the people of India' to protect and improve natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures under Article 51-A (g).[22] However, an explicit fundamental right has not been inserted even after the amendment. This gap has been bridged by the hon'ble Supreme Court and other courts of India by reading this right as a part of the right to life and personal liberty guaranteed under Article 21. [23] The provisions relating a trinity of rights, duties and state obligation provide a unique scheme for the protection and conservation of lakes and wetlands in India. In *Subhash Kumar v. State of Bihar* [24] case, it has been held by the apex court that "the right to life enshrined in Article 21 includes the right to enjoyment of pollution free water and air for the full enjoyment of life." Further the Madras High Court in *M.K. Janardhanam v. District Collector, Tiruvallur* case, held that "*the enjoyment of life and its attainment and its fulfillment guaranteed by Article 21 of the Constitution embraces the protection and preservation of nature's gifts without which life cannot be enjoyed and environmental degradation violates the fundamental right to life.*" [25] In *Vijay Singh Puniya v. State of Rajasthan* ,[26] the Rajasthan High Court was of the opinion that "*any person who disturbs the ecological balance or degrades, pollutes and tinkers with the gifts of nature such as air, water, river, sea and other elements of Nature, he not only violates the fundamental right guaranteed under Article 21 but also breaches the fundamental duty to protect the natural environment under Article 51-A (g).*"

It may be further noted that the Parliament is empowered to legislate on any matter for implementing the international treaty obligations under Article 253 [27] read with entry 13 and 14 of the Union List of Seventh Schedule of the Constitution. In exercise of the powers under this provision, the Parliament has enacted a number of legislations relevant and related to the environment including wetlands conservation, viz. the Environment (Protection) Act, 1986, the Wildlife Protection Act, 1972 etc. Furthermore the Constitution (73rd & 74th Amendment) Act, 1991 have empowered the Panchayati Raj Institution—the units of local self governments—to safeguard environment and ecology. [28] Thus

[21] Article 48-A reads, "the state shall endeavour to protect and improve the environment and to safeguard the forests and wildlife of the country."

[22] Article 51-A (g) reads that "it shall be the duty of every citizen to protect and improve natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures.

[23] Article 21 of the Constitution reads, "No person shall be deprived of his life or personal liberty except in accordance with the procedure established by law".

[24] AIR 1990 SC 420

[25] W.P.No.985 of 2000 decided on 26.07.2002.

[26] AIR 2003 Raj 286

[27] Article 253 reads that, "Notwithstanding anything in the foregoing provisions of this Chapter, Parliament has the power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body." Further entry 13 of Union List reads that, "Participation in international conference, association and other bodies and implementing of decisions made thereat" and entry 14 provides that, "Entering into treaties and agreements with foreign countries and implementing of treaties, agreements and conventions with foreign countries."

[28] *See*, Schedule XII, item 8 (protection of environment and promotion of ecological aspects); item 2 (land use); 6 (public health). Also see, Schedule XI, item 3 (water management and watershed development); item 5 (fisheries); and item 11 (drinking water).

it may be noted that the Constitution does enshrine adequate provisions for protection and conservation of our heritage and life support for several other creatures, i.e. lakes and wetlands.

## Statutory Safeguards

The Environment (Protection) Act, 1986, an umbrella legislation enacted with the object of protecting and improving the environment and for the matters connected therewith. The preamble to the Act provides that it has been enacted '*to take appropriate steps for the protection and improvement of human environment etc*.' The provisions of the Act empower Central Government to take all such measures that 'it deems necessary or expedient' for protecting and improving the quality of environment and for preventing, controlling, and abating environmental pollution.[29] In order to ensure environment protection, the Central Government has been empowered to constitute authorities [30] and officers; [31] frame rules and issue notifications/directions.[32] In exercise of these powers various steps have been taken by the Central Government by framing rules and issuing notifications which in fact are of immense importance in prohibiting/ restricting certain activities of industries, operations or processes etc. Such Rules and notifications significant for the conservation of wetlands include: *the Wetlands (Conservation and Management) Rules, 2010; the Hazardous Waste (Management and Handling) Rules,*[33] *1989 as amended in 2000; the Municipal Solid Waste (Management and Handling) Rules* [34] *2000 etc. Further, the Coastal Zone Management Notification, issued on* 19th Feb 1991 (as amended from time to time), classifies coastal zones in four categories, CRZ I, II, III, & IV and through this notification restriction has been imposed on industries, operations and processes in the Coastal Regulation Zone. It includes the coastal stretches of seas, bays, estuaries, creeks, rivers and backwaters which are influenced by tidal action upto 500 meters in the land ward side from the high tide line and the land between the low tide line and high tide line.[35] Other notification issued by the Central Government is the Environment Impact Assessment Notification, 1992 (as amended in 2006). [36]

## The Wetlands (Conservation and Management) Rules, 2010: A Critical Analysis

The above Rules have been notified by the Central Government in exercise of the powers conferred by section 25 read with sub-section (1) and clause (v) of sub-section (2) and sub-section (3) of section 3 of

[29] *See*, section 3 sub-section 1 of the Environment Protection Act, 1986.

[30] Refer sub-section 3 of section of the Environment Protection Act, 1986.

[31] For details, See, section 4 of the Environment Protection Act, 1986.

[32] See, section(s) 5, 6, and 25 of the Environment Protection Act, 1986 .

[33] These Rules direct the occupier generating hazardous wastes to take all practical steps to ensure that such wastes are properly handled and disposed off without any adverse effect. Further the rules direct that hazardous waste shall be collected, treated, stored, and disposed of only in such facilities as may be authorized for this purpose.

[34] Rule 4 declares that every municipal authority shall be responsible for implementation of rules and infrastructure development for collection, storage, segregation, transportation, processing and disposal of municipal solid waste.

[35] S. Shanthakumar's, Introduction to Environmental Law, 2nd Ed, 2005, Wadhwa & Co. Nagpur pp. 185-186.

[36] *Id*, at pp. 179-185.

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the Environment Protection Act, 1986. The Preamble to the Rules explicitly acknowledges our commitment for the conservation and wise-use of wetlands as a signatory to the Ramsar Convention. There are nine rules in all, wherein Rule 1 and 2 are general, i.e. provide for the title and commencement of the Rules and the definition clause. The definition of wetlands given under Rule 2 reads as under:

**"Wetlands"** *means an area of marsh, fen, peat land or water; natural or artificial, permanent or temporary, with water that is static or flowing, fresh, brackish or salt, including areas of marine water, the depth of which at low tide does not exceed six meters and includes all inland waters such as lakes, reservoir, tanks, backwaters, lagoon, creeks estuaries and manmade wetland and the zone of direct influence on wetlands that is to say the drainage area or catchment region of the wetlands as determined by the authority but does not include main river channels, paddy fields and the coastal wetland covered under the notification of the Government of India in the Ministry of Environment and Forests, S.O. number 114 (E) dated 19th February 1991…".* [37]

The above definition of wetlands can be classified in two parts, i.e. (i) wetlands generally and is inclusionary in nature, and (ii) is exclusionary. The first part is replica of wetlands defined under Article 1.1 of the Ramsar Convention and is almost similarly worded. Part II of the definition is exclusionary in nature and according to the above definition wetland does not include main river channels, paddy fields, coastal wetlands such as mangrove, marine algal beds, and coral reefs and other entities covered under the notification relating Coastal Regulation Zone. The definition clause also defines "National Park" [38] and "wildlife sanctuary"[39] under clause (d) and (h) of Rule ..

**2. Rule 3** enlists protected wetlands based on the significance of the functions performed by the wetlands for overall well being of the people. The wetlands that are protected under this Rule include: (i) wetlands categorized as Ramsar wetlands of international importance; [40] (ii) wetlands in areas that are ecologically sensitive and important; [41] (iii) wetlands as UNESCO world heritage sites; (iv) high altitude wetlands; (v) high altitude wetland complexes at or above an elevation of two thousand five hundred metres with an area equal to or greater than five hectares; (vi) wetland or wetland complexes below two thousand five hundred metres with an area equal to or greater than five hundred metres; and (vii) any other wetland identified by the Central Wetland Regulatory Authority.

**Rule 4,** titled as Restrictions on activities within wetlands may be divided in two categories, i.e. wetland areas where activities are prohibited; [42] and the areas

[37] *See*, Rule 2 clause (g) of the Rules 2010.

[38] Clause (d) Rule 2. "National Park" means an excavation activity or operation usually carried out at least partly underwater, in shallow sea or fresh water areas with the purpose of gathering up bottom sediments and disposing them off at a different location.

[39] Clause (h) Rule 2. "wildlife sanctuary" means an area declared as a wildlife sanctuary under the provisions of Chapter IV of the Wildlife (Protection) Act, 1972 and shall include an area deemed to be sanctuary under sub section (4) of section 66 of the said Act.

[40] There are 25 such wetlands enlisted in this category. For details, see, The Schedule to the Rules 2010.

[41] Ecologically sensitive and important areas include national parks, marine parks, sanctuaries, reserved forests, wildlife habitats, mangroves, corals, coral reefs, areas of outstanding natural beauty or historical or heritage areas and the areas rich in genetic diversity.

[42] *See*, clauses (i) to (vii) of sub rule (1) of rule 4 of the Rules, 2010.

wherein the activities are regulated.[43] Under the prohibited category, the activities are categorically enlisted and they include:

(i) reclamation of wetlands, (ii) setting up of new industries and expansion of existing industries, (iii) manufacture, handling or storage or disposal of hazardous substances, (iv) solid waste dumping, (v) discharge of untreated wastes and effluents from industries, cities or towns and other human activities, (vii) any construction of a permanent nature, and any other activity likely to have an adverse impact on the ecosystem of the wetlands. It may be pointed out here that in case of dumping of solid waste which existed before the commencement of these Rules must be phased out within a period of not exceeding six months and for discharge of untreated waste the period for phasing out such practice existing prior to these Rules is not exceeding one year from the date of commencement of these Rules. Further the construction of permanent nature within fifty metres from the high flood levels, observed in the past ten years, has been prohibited except for boat jetties.

The Regulated Activities, given in sub rule (2) of Rule 4, are not to be undertaken without prior approval of the State Government within the wetlands. Such activities include withdrawal of water or impoundment, diversion, or interruption of water resources, harvesting of living/non living resources, grazing so that the basic nature and character of biotic community is not adversely affected, treated effluent discharges, plying of motorized boat, dredging only if the wetland is impacted by siltation, construction of boat jetties, activities within the zone of influence, facilities required for temporary use, aquaculture, agriculture, and horticulture activities, repair of existing building and infrastructure including reconstruction activities, and any other activity as identified by the Authority. The above Rules seems to be appropriately crafted and drafted for ensuring effective conservation of the wetlands but the rigorosity of the above Rules appears to be diluted under sub-rule 3. Sub rule 3 begins with a '*non-obstante*' clause which means nothing mentioned above in sub-rules (1) and (2) would affect the exercise of power vested in sub-rule (3). It authorizes the Central Government to permit any of the prohibited activities or non-wetland use in the protected wetlands on the recommendation of the Central Wetland Regulatory Authority established under these Rules. This sub- rule read with sub-rule (5), although, puts an embargo on conversion of wetlands for non-wetland use but it is left to the satisfaction of the Central Government on the recommendation of the Wetland Authority that '*it is expedient in the public interest*'. Although the rules require that the reasons justifying the decision must be recorded. Here it may be pointed out that the similar provisions have been made in the Forest Conservation Act, 1980 for using the protected forests for non forest purposes.[44] But our experience about the prevailing politics, political will of the nation and policy and practice of appeasement of masses or interested/pressure groups should not guide our action for conversion of wetlands for non-wetland use otherwise it may lead to victimization of wetlands of the country. It is to say that such exercise must be undertaken very cautiously and judiciously to sub-serve the larger public interest.

[43] *See*, clauses (i) to (xii) of sub-rule (2) of rule 4 of the Rules, 2010

[44] *See*, section 3 of the Forest Conservation Act, 1980.

## Composition, Powers and Functions of the Wetland Authority

### (a) Constitution and Composition

Rule 5 lays down the constitution, composition, powers and functions of the Central Wetlands Regulatory Authority. This Authority is constituted in exercise of the powers conferred on the Central Government under section 3 sub-section (3) of the Environment (Protection) Act, 1986. The Wetland Authority consists of the Secretary, Ministry of Environment & Forests, Government of India as the Chairperson and the Director or Additional Director or Joint Director dealing with wetlands in the Ministry of Environment & Forests will be the Member Secretary. Besides it shall have ***Six*** ex-officio Members of other ministries viz. Tourism, Water Resources, Agriculture, Social Justice (not below the rank of Joint Secretary) and the Chairman or his representative of the Central Pollution Control Board. In addition to above ex-officio members, the Authority shall also have four expert members drawn from the fields of Ornithology, Limnology, Ecology and Hydrology. Thus the Authority consists of total *twelve* members.[45] The term of the Authority is three years as given in the sub-rule (2) of rule 5.

### (b) Powers and Functions of the Authority

The powers and functions of the authority are enumerated under sub-rules (3) to (5) of the Rule 5. The powers include:

- To grant clearances or identify the areas for the grant of clearance for regulated activities in consultation with the local state government;
- To determine the zone of direct influence of the wetlands in consultation with the local authority;
- Issue directions necessary for the conservation, preservation and wise-use of wetlands to the State Governments.

Here it may be noted that these Rules have the similar effect as the provisions of the Environment (Protection) Act, 1986 and any defiance/violation/non-adherence would make it an offence and entail penalty given under sections 15 to 17 of the Environment (Protection) Act, 1986.
The functions of the Authority include:

- To appraise proposals for identification of new wetlands, projects or activities in consultation with local authority;
- Identify and interface with the concerned local authorities to enforce provisions of these rules and other laws in force;
- To make periodical review of the list of wetlands and the details of prohibited and regulated activities under these rules; and
- To specify the threshold levels for activities to be regulated and the mode and methodology for undertaking activities in wetlands.

The process for identification of wetlands has been enumerated under Rule 6. Sub-rule (1) provides that 'the wetlands covered under item (i) of rule 3 specified under Schedule shall be the wetland to be regulated under these rules. For identification and classification of wetlands, the State Government is to prepare a 'Brief Document' in accordance with the criteria specified under Rule 3 within a period of one year and to submit the same to the Wetland Authority. [46] Under sub-rule (3) the 'Brief Document' so prepared by the State Government under above sub-rule must contain the information given in

[45] *See*, for details, Rule 5, sub-rule (1) of the Rules, 2010.
[46] Refer sub-rule (2) of the rule 5 of Rules, 2010.

clauses (i) to (iv) which include: broad geographic delineation of the wetlands; its zone of influence along with a map; size of the wetland; and account of pre-existing rights and privileges, consistent or not consistent with the ecological health of the wetland. The Wetland Authority, on receipt of this 'Brief Document', may refer it to a research institute or university having multi-disciplinary expertise related to wetlands to conduct a comprehensive survey of the wetland. This may be done by the Wetland Authority in consultation with the State Government within a period of thirty days. The institute/university to which the matter has been referred will have to submit a report within next ninety days from the date of such reference to the Authority.[47] Under sub-rule (5), the Authority shall take a decision on the proposal, in consultation with the State Government, within a period of ninety days from the date of receipt of the report.

Thereafter, the Central Government on receipt of the recommendation of the Wetland Authority shall notify the area of wetlands for public information inviting objections and suggestions from the general public likely to be affected which may make their representation to the Central Government within a period of sixty days. Such representations are to be considered by the Wetland Authority and submit its recommendation on such representation(s) to the Central Government within sixty days for final notification.[48] Here it seems that the Rules are silent about further submission of representations so received by the Central Government to the Authority and the timeline thereof. Thereafter, the Central Government shall issue notification relating the area of wetland, its category or classification in English and vernacular languages. The Wetland Authority has been given power to review any decision under these rules or issue direction for inclusion of wetland either *suo motu*, i.e. on its own or on an application.

## Miscellaneous Provisions

The miscellaneous provisions relating the conservation and management of wetlands are given under Rules 7 to 9. Rule 7 titled as ***overlapping provisions*** may be seen as a saving clause for application of other laws in force relevant and related to the wetlands. sub –rule (1) provides that 'the wetlands situated within the protected areas of the National Parks and Wildlife Sanctuaries shall be regulated by the provisions of the Wildlife Protection Act, 1972' and those situated 'within the protected or notified forest areas' shall be regulated by the provisions of the Indian Forests Act, 1927, the Forest Conservation Act, 1980 and the Environment (Protection) Act, 1986. However, in case the regulation of 'wetlands not covered under any of the above Acts', the provisions of the Environment (Protection) Act, 1986 are to be invoked. [49] Rule 8 recognizes the Departments for regulating the identified activities for management and wise-use of wetlands situated within the protected or notified forest areas shall be regulated by the Forest Department of the concerned State or outside of it by the nodal Department or the relevant local state agencies to be designated by the State Government within six months from the date of commencement of these rules. Aggrieved persons may prefer an appeal against the decision of the Wetland Authority to the National Green Tribunal within a *period of*

47 Please see sub rule (4) of the rule 5 of Rules, 2010.

48 *See*, sub rule (7) of the rule 6 of Rules, 2010.

49 Refer Rule 7 sub-rules (1) to (4) of the Rules, 2010

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*sixty days* from the date of decision. Delay in filing appeal may be condoned by the National Green Tribunal, if it has been sufficiently/satisfactorily explained by the aggrieved party. [50] This is a discretion vested with the Tribunal to condone or refuse condonation of delay.

## Safeguards for Wetlands in Other Statutes

In addition to the Environment (Protection) Act, 1986 and the rules framed and notified by the Ministry of Environment and Forests including the Wetland Rules 2010, other statutes relevant for conservation of wetlands include the Wildlife (Protection) Act, 1972, the Indian Forests Act, 1927, the Forest Conservation Act, 1980 and the Water (Prevention and Control of Pollution) Act, 1974. The relevant provisions of these Acts are discussed here-in-under:

### (a)The Wildlife Protection Act, 1972

The above Act was enacted solely with the aim of protecting wildlife, birds, and plants and for the matters connected thereto or ancillary or incidental thereto with a view to ensure the ecological and environmental security. [51] It extends to all the States in India except the state of Jammu & Kashmir. It provides for the establishment of sanctuaries [52] and National parks [53] and thus offers protection to wetlands falling within protected or notified forest areas. As per the Wetland Rules 2010, the activities within these areas are to be regulated under the provisions of this Act.[54] This law places a strict ban on grazing within a National park and hence prohibits the human impact and influences on the wetland ecosystem once this is declared as a National park. This restriction in national parks, which are zones of highest protection in protected area categories, makes wise use of the wetland virtually impossible. Further designation of the protected area as a National park leading to denial of access to the local inhabitants so far as their grazing rights and fuel-food collection from the area of wetland situated within the designated national park. This may lead to conflict between the park management and local people whose traditional and evidently sustainable relationship with the wetland has been disrupted. [55]

### (b)The Forest Laws and Wetland Conservation

As given under rule 7(2) of the Wetland Rules, 2010 that the wetlands within the protected or notified forest areas shall be regulated by the provisions of the Indian Forests Act, 1927 and the Forest Conservation Act, 1980, it becomes imperative to look at the relevant provisions of these Act(s). The Indian Forests Act, 1927 provides for the establishment of independ-

[50] Rule 9 of the Rules, 2010 refers.

[51] *See*, the Statement of Object and Reasons Clause of Amendment Act of 2002 to the Wildlife (Protection) Act, 1972.

[52] *See*, sections 18-34 of the Wildlife (Protection) Act, 1972, provides that the State Government, by notification, declare its intention to constitute an area other than an area comprising any reserve forest or territorial waters, as a sanctuary if it considers that such area is of adequate ecological, financial, floral, geo-morphological, natural or zoological significance, for the purpose of protecting, propagating or developing wildlife or its environment. See, also, Chief Forest (Conservator) Wildlife v. Nisar Khan, AIR 2003 SC 1867.

[53] For details, see, section 35 of the Wildlife (Protection) Act, 1972.

[54] Refer rule 7(1) of the Rules, 2010.

[55] *See*, for details WWF-India, 1996 Participatory Management Planning for the Keoladeo National Park, New Delhi, India cited in Devaki Panini, The Ramsar Convention and Traditional Laws and Policies for Wetlands in India.

ent machinery, i.e. the Department and its officials, the wetlands conservation may get a fragmented treatment or a deferred priority. However, the Forest Conservation Act, 1980 prohibits use of forest land for non-forest purposes [56] and it works on license-permit system, i.e. such activities may be undertaken with prior approval of the Central Government which works on the recommendation of the Advisory Committee. [57] Whether the Advisory Committee shall adequately keep in mind the likely impact of the activities recommended for the approval of the Central Government on the wetlands and its conservation or not need be carefully considered?

### (c) The Water (Prevention and Control of Pollution) Act, 1974

The above Act makes certain provisions relevant for ensuring wetland conservation more effective. The main aim and object of the Water Act, 1974 is 'to maintain or restore the wholesomeness of water and to prevent, control and abate water pollution'. It establishes the Pollution Control Boards [58] and Joint Boards and enumerates their functions. Section 24 of the Act empowers the pollution control board to prohibit use of streams which includes rivers, watercourse, inland water, subterranean water, sea or tidal or well for disposal of polluting matters otherwise than in accordance with the standards laid down by the Board.[59] Further section 25 of the Act imposes restriction on use of new outlets and new discharges as it provides that if a person establishes an industry, process or operation or any treatment and disposal system likely to discharge sewage or trade effluent into a stream or well or sewer or on land, he must obtain prior consent of the State Board. The Board is also empowered to review the conditions imposed while granting consent from time to time and may also revoke or modify them[60] besides having the power to carry out emergency operations in case of pollution of water as given under section 32 of the Water Act, 1974. It may be pointed out here that violation of any directions/orders/ notifications are considered to be offences under the Act and lead to penal consequences.

### Recent Judicial Trends in Conservation of Lakes and Wetlands

The Indian judiciary has played an activist role, adopted enviro-friendly approaches and contributed immensely for protection and improvement of environment including safeguarding the forests, lakes, wetlands and other species. Some of the important decisions of the hon'ble apex court dealing with wetland justice are briefly discussed here. In *M.C. Mehta v. Union of India,* [61] case the attention of the court was drawn to order prohibition on mining operations within five kilometer radius of Surajkund and Badkhal lake in the State of Haryana. It was argued on behalf of the builder that the construction could be banned at the most within 200 to 500 metres in view of the directions issued by Government of India under the Environment (Protection) Act, 1986. The court did

[56] Section 2 of the Forest (Conservation) Act, 1980 refers.

[57] Section 3 of the Forest (Conservation) Act, 1980 refers.

[58] *See*, sections 3 & 4 for constitution of Central and State Pollution Control Boards respectively. Their functions are enlisted under sections 16 & 17 respectively.

[59] For details, see, section 24 (1) of the Water Act, 1974.

[60] *See*, section 27 of the Water Act, 1974.

[61] (1997) 3 SCC 715

not agree with the argument and held that the functioning of ecosystems and the status of environment cannot be the same in the country. Preventive measures have to be taken keeping in view the carrying capacity of the ecosystem operating in the environment surroundings under consideration. It accordingly directed that "*no construction of any type shall be permitted now onwards within five kilometer radius of the Surajkund and Badkhal lake. All open areas shall be converted into green belts.*" The court further directed that a small area may be permitted, if it is of utmost necessity, for recreational and tourism purposes. This endeavour of the Court has achieved several milestones since then. In *Subhash Kumar v. State of Bihar,* [62] the Supreme Court held that 'right of enjoyment of pollution-free water and air for full enjoyment of life is a part of right to life guaranteed under Article 21 of the Constitution. In *Vellore Citizen's Welfare Forum* case [63] wherein it was alleged that the tanneries in Tamil Nadu are discharging untreated effluents into Palar river which not only contaminated drinking water but due to highly toxic nature of effluents it rendered the land of the area unfit for cultivation. The Supreme Court came down heavily both on the polluters and the Government by imposing fine on all polluters and directing the Central Government to constitute an Authority under section 3(3) of the Environment (Protection) Act, 1986. It further directed that the Authority so constituted shall implement the "*precautionary principle*" and the "*polluter pays principle*". The Authority was further directed '*to determine and award compensation and to recover compensation for loss of ecology of the area and frame a scheme to reverse the degraded ecology of the area.*'

**(Emphasis Supplied)**

In shrimp culture case,[64] the petitioner had drawn the attention of the Supreme Court on growing shrimp culture farm on sea coast and sought the direction of the court for effective implementation of Coastal Zone Regulations. It was stated that the Tamil Nadu part of the *Pulicat* lake is ecologically important since it has the only opening of the lake into the sea thus functions as the migratory route of these spawn animals like prawns, fish and mud crabs. The mud flats of *Pulicat* lake harbors a number of winter migratory birds. It was further noted that the water fowl sanctuary at *Pulicat* is slowly being destroyed and also that Prawn farms are located all around the wetland. In the northern region of the lake prawn farms are situated even in the lake-bed. It was declared by the Supreme Court that setting up of modern shrimp aquaculture farms, right on sea-coast and construction of ponds and other infrastructure thereon is per-se hazardous and is bound to degrade marine ecology, coastal environment and aesthetic uses of sea coast. Accordingly the court ordered them to be closed. In yet another writ petition[65] under Article 32 of the Constitution of India relating to conservation of wetlands in the country for preservation of the environment and maintaining the ecology, the Court suo motu expanded its scope so as to include the problem of acute water shortage in our country. The main reasons for that, according to court, was that most of the water conservation bodies in our coun-

62 (1991) 1 SCC 598

63 *Vellore Citizen's Welfare Forum v. Union of India,* (1996) 5 SCC at 665.

64 *S. Jagannath v. Union of India* (1997) 2 SCC 87; see also, *T.N. Godavarman Thirumulpad v. Union of India and Ors.,* AIR 2005 SC 4256.

65 *M.K. Balakrishnan and Ors. v. Union of India,* (2009) 5 SCC 507

try such as ponds, tanks, small lakes etc. have been filled up in recent times by some greedy persons and such persons have constructed buildings, shops etc. on the same. The court reiterated the wisdom of our ancestors and our ancient environmental ethics by observing that,

"*Our ancestors were wise people who realized that because of droughts or some other reasons there may be shortage of water in future and hence they made the provision of a pond near every village, tanks in or near temples, etc.... The whole idea behind this was that whenever there is a shortage of water due to drought etc., people may not suffer and they may use the water available in ponds, tanks etc. Unfortunately, people have forgotten the wisdom of our ancestors and that is why some greedy people for their personal interest and to make money have filled up most of these ponds, tanks etc. and have constructed buildings thereon with the result that in most parts of India, there is a terrible water shortage and people are suffering terribly, particularly, in the summer season both in rural and urban areas. When water is not available, people come to the streets and there are chakka jams (road blocks), riots etc. to awaken the government authorities to take some measures to make available the necessity of life to the general public called water.*"

It further held that material resources of the community like forests, tanks, ponds, hillock, mountain etc. are nature's bounty. They maintain delicate ecological balance. They need to be protected for a proper and a healthy environment which enable people to enjoy a quality life which is the essence of the right guaranteed under Article 21 of the Indian Constitution. Consequently, the occupants were ordered to vacate the land within six months from the date of decision.

*In Vaamika Island* (*Green Lagoon Resort*) *case*,[66] the Vembnad Lake, declared as a Ramsar site in 2002 and a Critically Vulnerable Coastal Area (CVCA), situated in the state of Kerela, is the second largest wetlands in India. It was reported to be undergoing severe environmental degradation due to increased human interventions through developmental activities. The lake supports exceptionally large biological diversity and also plays an important role in the ecology and economy of the State. It has immense conservation importance as it supports a large aquatic biodiversity and the most important migrating bird's habitat of the fin, shell-fish and a nursery of several species of aquatic life. It was alleged that there is shrinkage of lake as a result of land reclamation to the extent of 5.21 acres. It was found by the High Court that the petitioner had effected the construction in violation of the provisions of CRZ Notifications 1991 and 2011 and accordingly directed them to be removed. These directions were upheld by the Supreme Court.

In yet another case, [67] the Punjab State Government, acquired hilly area measuring 6172.09 acres of *Sukhna* lake catchment for carrying out soil conservation works so as to reduce the silt in-flow into the lake. The land proposed to be acquired falls in the ecologically fragile green belt along the *Sukhna* lake However, the area so acquired was later converted for urbanization and other developmental activities. It was pointed out that, if permitted, it would lead to degradation of habitat and disturb migratory birds which come every year to *Sukhna* lake. It was also stated by the petitioners that permitting urbanization next to *Sukhna* lake is likely to be a death knell for the precious wildlife. It was held by the apex court that the purpose specified in the notifications issued was not a bona

[66] *See*, for details, *Vaamika Island* (*Green Lagoon Resort*) *v. Union of India,* (2013) 8 SCC 760.
[67] *S.S. Brar & Ors. v. Union of India and Ors.*, (2013) 1 SCC 403.

fide public purpose and that in the garb of acquiring land for IT Park etc., the Chandigarh Administration wanted to favour the private developers. The Supreme Court quashed the notifications and upheld the appeal.

In yet another case, *Jal Mahal Resorts Pvt. Ltd. v. K.P. Sharma and Ors,* [68] three PILs were filed before the Jaipur High Court challenging the grant of lease of 100 acres land which was alleged to be the part of a wetland, i.e. Mansagar Lake Basin in Jaipur. The High Court quashed the grant of lease of 100 acres of land and allowed the petitions. The same was challenged before the Supreme Court. At the apex court, it was proved that only 8.5 acres land was recorded as '*gairmumkin talab'* (lakebed) and 14.15 acres as '*banjar'* (barren land) in the revenue records and the petitioners (respondents here) failed to prove to the contrary. From the facts of the petition it was abundantly clear that *the Jal Mahal Tourism Infrastructure Project* was conceived and approved in the year 1999 and the lease had been granted after following the process in the year 2005. Although the petitioner(s)/respondents approached the High Court only after 5 – 6 years which according to court 'clearly fails the test of utmost good faith' and it was also contended that '*the petitioners lack bonafide to prefer the PIL as he (K.P. Sharma and Dr. Brij Gopal) had approached the appellant purporting to offer their services for monetary reward*'.[69] The Supreme Court, after detailed scrutiny, came to a conclusion that the provisions of the Wetland Rules 2010 do not apply to the present case as the project was approved/lease granted in the year 2005 after due PIA clearances issued prior to the commencement of the project. The court, accordingly, quashed the grant of lease to the extent of 8.65 acres only as lakebed—the part of wetland and other 14.15 acres was declared as '*no construction zone*' with clear direction to the state government and the appellant not to undertake any construction in that area which clearly depicts the court's endeavour to ensure conservation of wetlands in the country. Further that in *Lake Palace Hotels and Motels Pvt. Ltd. v T. Srinivasan case*,[70] the Hon'ble apex court ensured that no construction work is undertaken in violation of the provisions of National Lakes Conservation Plan and other statutory provisions viz. the Wetland Rules 2010.

In yet another recent decision, delivered by Hon'ble Justice Chelameswar and Pinaki Chandra Ghose, JJ, in *Vardha Enterprises Pvt. Ltd. v. Rajendra Kumar Razdan*[71] case, the applicant had purchased a piece of land, ad-measuring 8.2 hectares, in Tila Kheda Village located at a distance of approximately 20 kilometers from the two lakes i.e. Fatehsagar Lake and Pichola Lake in district Udaipur for construction of a five-star hotel. The applicant had obtained permission from various authorities for the purpose of construction. The construction could not commence within the prescribed period of permission for a variety of reasons. Accordingly, the applicant approached the authorities to renew the permission which was denied stating that a Committee, constituted under the provisions of the Wetlands (Conservation and Management) Rules, 2010, "*...has identified Udaisagar lake of Udaipur District as Protected Wetland under Rule 3 (II) (V) of above referred Wetland Rules 2010. Further that raising of any type of construction of permanent na-*

[68] (2014) 8 SCC 804. (Earlier the Rajasthan High Court vide its order dated 17.5.2012 had quashed the grant of lease of entire 100 acres of land).

[69] *Ibid* Para 50 and 105.

[70] MANU/SC/0954/2014.

[71] MANU/SC/1055/2014.

*ture is prohibited, under Rule 4 (VI), in the areas identified as protected wetlands vide Rule 3 of the Wetlands Rules, 2010*". This order of the competent authority was challenged before the Supreme Court and it was submitted that: (1) the Rules were framed subsequent to the date of the original permission for the construction of the applicant's project. Therefore, such rules cannot be made applicable to defeat the rights vested in the applicant by virtue of the statutory permission granted on 31.12.2009; (2) secondly, the Rules are applicable only to identified wet lands. The area in which the construction of the applicant is going on has not yet been identified as a wetland for the purpose of above-mentioned rules; and (3) Even otherwise, according to the applicant, the construction of the applicant is not within the prohibited distance contemplated under Rule 4(1)(vi) that is a "*distance of 50 meters from the mean high flood level observed in the past 10 years calculated from the date of commencement of these rules*" of the Udaisagar Lake.

The Court, on examination of the scheme of the Wetland Rules, 2010, came to a conclusion that '*the applicant is right in his first two submissions*'. First of all, the area where the applicant's construction is going on has not yet been legally notified as a wet land under the Rules. In the absence of any legal embargo as on today, the applicant's right to carry on the construction according to the existing law and various permissions granted under it cannot be frustrated by executive action in anticipation of some embargo which is likely to be created in future. Further that by virtue of the factum of the ownership of the land the applicant has a legal right to make any construction on the land; subject to the reasonable restrictions imposed by law. It is the undisputed case that the applicant was granted all the necessary permissions under the existing law in the year 2009 enabling the applicant to undertake the construction in question. Such a vested right cannot be defeated by an executive order. That the prohibition contemplated under Rule 4 (1) (vi) can operate only on the identification of a wetland in accordance with the procedure prescribed under Rule 6 which is not yet made. Even if such identification were to be made tomorrow, the vested rights of the applicant cannot be defeated by executive action of denying the renewal sought by the applicant. The third submission was left un-examined as it involved a question of fact and such inquiry at that stage was not required in the absence of identification of the area as wetland. Making strict interpretation of the Wetland Rules 2010, the Supreme Court held that '*the opinion of the renewal authority that the applicant is not entitled for renewal for the permission of construction is not only illegal but wholly perverse and the same is required to be set aside*'. The court, accordingly directed the concerned authority to grant renewal if application for renewal is otherwise in order. The above order of the hon'ble apex court upheld the law not only in letters but spirit as well as the construction site of the hotel was far away i.e. approximately 20kms away from a wetland that too which has not yet been identified as a wetland under the Wetlands Rules 2010.

## The Emerging Scenario and Way Ahead: The Findings and Conclusions

On a detailed scrutiny of international law developments on wetlands' conservation and management, it is noted that the international community has seriously engaged itself in the quest to protect, conserve and manage the wetlands. The Ramsar Convention (1971) has been refined from time to time through the Conference of Parties and the gaps that were noted have been filled by defining some

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of the terms like, *wise-use, sustainable utilization and the natural properties of the ecosystem of wetlands*. Looking to the national character of wetlands, the Convention has adequately justified the international commitment and laid down measures for conservation and management of wetlands.

At the domestic front, the Constitution of India did include several provisions to ensure conservation of wetlands and lakes by the State and Union government. This has further been strengthened by the Constitution (Forty-second Amendment) Act, 1976 which introduced the state obligation under Article 48-A and a fundamental duty on the citizens under Article 51-A (g) besides redefining the legislative competence by shifting some of the relevant legislative heads from List II to List III of the Seventh Schedule. Further grass root democracy has been introduced by the Constitution (73rd & 74th Amendment) Act, 1991 and the units of local self government have been assigned the duty to engage themselves in this conservation and management drive of lakes and wetlands.

It is noted that the existing statutory framework has been amended, modified, re-vamped with a view to ensure better protection and management of wetlands. The Rules framed and Notifications issued by the Central Government are quite effective in achieving the goals, if implemented in letters and spirit. The Wetland (Conservation and Management) Rules, 2010, a fairly younger weapon in the armory of statutory framework, have been added to ensure effective and efficient conservation and management of wetlands. However, multiple institutions and authorities continue to dominate. Looking to the composition of the Regulatory Authority, it sounds that wetlands would definitely be better regulated and managed but they should become a prey to complacency, lack of commitment and priorities of different Departments/Officials will have be taken care of. The time-lines have been given in the Rules for identification of wetlands but meeting them may be an onerous task. The Rules provide for prohibition of activities and regulation of certain activities but the Central Government has been vested with the powers to permit any prohibited activity or non-wetland use of the wetlands. Although it may be argued that adequate safeguards have been provided in the Rules , i.e. on the basis of recommendation by the Regulatory Authority which is required to give reasons justifying such activity yet the power has to be exercised cautiously, carefully and judiciously keeping in mind the pre-dominant purpose of protection and conservation of lakes and wetlands and also keeping in mind that they provide habitat and life support for several species besides being valuable to the human welfare. Further, the Wetland Rules, 2010 are silent about penalties, but it does not mean that violation of directions, orders, notifications and the Rules will not invite punishment. The violators shall be punished under the Environment (Protection) Act, 1986, the penalty under which is imprisonment which extends up to seven years under sections 15 to 17, as applicable. Other statutes also continue to remain relevant which is also clearly manifested from the Rule 7 of the Wetland Rules, 2010.

So far as judiciary is concerned, it has excessively engaged itself in ensuring environment protection and conservation of natural resources, as is reflected from the decisions mentioned above. Setting up of the National Green Tribunal is another step to ensure speedy environmental justice. Also, as given under Rule 9 of the

Wetland Rules, 2010, the appeals against the decisions of the government would lie before the National Green Tribunal which will ensure better speedy justice to wetlands, as and when required.

## The Way Forward

- Thus it is suggested that it is necessary to take up wetland conservation on the lines of *wise-use* as suggested in the Ramsar Convention.
- Emphasis must be given to the *'precautionary and preventive approach'* rather than curative through *'polluter pays principle'*.
- The concerned officials and different stake-holders must be appraised about the significance of wetland conservation through education & awareness campaigns and refresher training programmes.
- Also mass campaign for sensitizing the citizens must be undertaken so as to empower them to discharge their fundamental duty enshrined under Article 51-A (g).

- Last but not the least it may be said mere enactment of a law or framing and notifying rules/regulations is not a panacea because had it been so, looking to the laws that we have in our country, there would have been best governance generally and environmental good governance in particular. Therefore it is suggested that an empirical study on the impact and effectiveness of the Wetland Rules, 2010 may be made from socio-economic and legal dimensions of wetland conservation and management in the country.

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# TAX IMPLICATIONS UNDER THE SERVICE TAX AND VALUE ADDED TAX ON TRANSFER OF RIGHT TO USE IN RESPECT OF ADVERTISEMENT HOARDINGS, PANELS, BOARDS AND FRAMES ETC

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## ABSTRACT

The research work is conducted to answer the query and to end in a logical conclusion, various concepts that linger with each other have been discussed. To answer the tax implications on the said query, the Constitutional Provisions, Finance Act, 2012 and the relevant cases laws are hereby imbibed in the research. After the introduction of the Negative List and many insertions of definition (like service, declared service), the entire service regime has changed. Therefore, due to lack of controversial cases (after the insertions in the Finance Act, 2012), the author has attempted to co-relate the present insertions of the Finance Act, 2012 to the already established cases (prior to the insertions). But firstly, the author has emphasised on the explaining certain terminology like, what is meant by transfer of right to use, deemed sale, declared service, interpretation of the Negative List which excludes the sale of space for advertisements other than the advertisement broadcast by radio or television, the co-relation of VAT and Service, when to levy service tax or sales tax and how to find the thin line off difference between the two. The explanation is done with the help of relevant cases and statutes. Hence, the author has reached a final conclusion and stated his stand in accordance with the query.

**Key Words :** Tax Implications, Service Tax, Value Added Tax, Transfer of Right.

PAGE : 13 REFERENCES : 51

## INTRODUCTION

The Constitution of India divided the VII Schedule into 3 parts into Lists. List I elucidates the Entries where the Central Government can enact laws; List II includes the Entries where State Government can enact laws, whereas List III which deals with the Concurrent List, both the Centre and the State Government can enact laws. By sticking to the topic to analyse, we will have to see that under which provisions of these particular Lists does the '*Advertisement Hoardings, Panels, Boards etc*' fall into.

One of the Items Specified under the **List II of the VII Schedule in the Entry 55 states the following**; "*Taxes on advertisement other that the advertisement published in the newspaper and the advertisement broadcast by radio or television*". Therefore, the State Government is empowered to levy tax such advertisement which are not the advertisement published in the newspaper and the advertisement broadcast by radio or television.

The topic to be analysed itself has created many issues, which are in the form of question of fact as well as question of law. The issues to be addressed are as follows:

1. What is the impact on the Service Tax regime after the introduction of the Negative List?
2. Whether the transfer of right to use amounts to 'sale'?
3. What are the necessary attributes of 'sale'?
4. Under which situation service tax can be levied?
5. Under which situation VAT or the Sales Tax can be levied?
6. Does the intention of the parties have any role to play?

## INTRODUCTION OF THE NEGATIVE LIST

Due to notification dated **01. 07. 2012** [1], the negative list was introduced and **Section 66D** was added in the Finance Act, 2012. There is an explicit non-taxability of the services as prescribed under this section. Under the **Section 66D**, its clause (g) is worth noting. **Section 66D** (g) states, "*selling of space or time slots for advertisements other than advertisements broadcast by radio or television*".

The clause stated above contains two limbs:

1. Selling of space or time slots for advertisement will not be taxable.

2. Advertisement broadcast by Radio or Television will be taxable.

The definition of '**Advertisement**' is present under Section 65B of the Act as form of presentation for promotion of, or bringing awareness about, any event, idea, immovable property, person, service, goods or actionable claim through newspaper, television, radio or any other means but does not include any presentation made in person.[2] But there is no definition of the term '*selling of space or time slots*'. The meaning of these words is to be judged and understood in the commercial parlance. In many cases the advertisers who intend to advertise their product, services and events specify the duration and time during which their advertisement shall be displayed. Selection of the time duration depends on the product.

Sale of space for advertisement in print media, Sale of space for advertisement in bill boards, public places, buildings, conveyances, cell phones, automated teller machines, internet, will not be levied with service tax after the inclusion of the negative list. [3]

Service Tax is not to be levied on the sale

[1] Inserted, w.e.f.1-7-2012 vide Notification No 19/2012-ST, dated 5-6-2012.
[2] Inserted (w.e.f. 1.7.2012) by s.143 of the Finance Act.. 2012 ( 23 of 2012).
[3] D. O. F. No 334/1/2012-TRU, New Delhi, dated 16th March, 2012, at page 39.

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of space for advertisement in print media as it is covered by the negative list.

After discussing the concept of the Negative List and the inclusion of Advertisement within the said list, it becomes indispensable to shift the focus on few concepts before going into the details of the query. The concepts that are pertinent to be addressed are '*transfer of right to use*', deemed sale, what constitutes sale and deemed sale, relationship between Service Tax and VAT.

## MEANING OF THE TERMINOLOGY '*TRANSFER OF RIGHT TO USE*'

**The Article 366 (29) of the Constitution of India states the following:** Tax on income includes a tax in the nature of an excess profits tax;

(29A) tax on the sale or purchase of goods includes :

a) a tax on the transfer, otherwise than in pursuance of a contact, of property in any goods for cash, deferred payment or other valuable consideration;
b) a tax on the transfer of property in goods (whether as goods or in some other form) invoked in the execution of a works contract;
c) a tax on the delivery of goods on hire purchase or any system of payment by instalments;
d) a tax on the transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration;
e) a tax on the supply of goods by any unincorporated association or body of persons to a member thereof for cash, deferred payment or other valuable consideration;
f) a tax on the supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (whether or not intoxicating), where such supply or service, is for cash, deferred payment or other valuable consideration, and such transfer, delivery or supply of any goods shall be deemed to be a sale of those goods by the person making the transfer, delivery or supply and a purchase of those goods by the person to whom such transfer, delivery or supply is made;

**The Article 366 (29A) (d)** clearly elucidates the '*transfer of the right to use any goods for any purpose'*. This is the area of focus in the analysis. The most artificial extension of the concept of sale is made by the present sub section. Under the present sub clause, there is no transfer of title at all. The second party gets the right to possess the goods for his use, for which he pays consideration. On a plain reading of Article 366 (29A) (d), the taxable event takes place when there is a transfer of the right to use the goods regardless of when or whether the goods are delivered for use. What is required is that the goods are to be existence.

The important thing to note here is that the levy of tax is not on use of goods, but on the transfer of right to use goods. The right to use goods only accrues on account of the transfer of right.[4] For example, hiring a cab from a rental agency where the agency delivers the car to the

[4] *20th Century Finance Corpn. Ltd v. State of Maharashtra*, AIR 2000 SC 2436 : (2000) 6 SCC 12.

person for his use during a specified period and the person concerned returns the vehicle after use and pays to the agency the charges for such use, or, hire of articles from a furniture worker for his use for a specified period and the payment of appropriate charges on its return after the use, are instances within the ambit of Art. 366 (29-A) (d).[5]

In the case of *BSNL v. Union of India,*[6] Justice A.R. Lakshmanan gave very appropriate requisites which would emphasise on *'transfer of the right to use goods*'. To constitute a transaction for the transfer of the right to use the goods the transaction must have the following attributes:

a) There must be goods available for delivery;

b) There must be a consensus ad idem as to the identity of the goods;

c) The transferee should have a legal right to use the goods, consequently all legal consequences of such use including any permissions or licenses required therefore should be available to the transferee;

d) For the period during which the transferee has such legal right, it has to be the exclusion to the transferor. This is the necessary concomitant of the plain language of the statute viz. a "*transfer of the right to use*" and not merely a licence to use the goods;

e) Having transferred the right to use the goods during the period for which it is to be transferred, the owner cannot again transfer the same rights to others. [7]

We can come to the conclusion that '*transfer of right to use*' is similar to '**deemed sale**' as per the Article 366 (29A). Every transfer of goods on lease, license or hiring basis does not result in transfer of right to use goods. '*Transfer of right of goods*' involves transfer of possession and effective control over such goods. Transfer of goods without transfer of possession and effective control over goods would not be a sale but a service. [8]

## WHAT CONSTITUTES DEEMED SALE?

In *Rashtriya Ispat Nigam Ltd. v. Commercial Tax Officer, Company*,[9] the issue in the writ petition was the scope of exigibility of sales tax under section 5-E [10] of the Andhra Pradesh General Sales Tax Act, 1957, on the hire charges collected by a person on supply of machinery for execution of his work to any contractor. The brief facts of this case are that the

[5] *See* Arvind P. Datar, Commentary on the Constitution of India, 2nd Edn.
[6] *Bharat Sanchar Nigam Ltd v. Union of India,* AIR 2006 SC 1383 : (2006) 3 SCC 1.
[7] *Id*, by Hon'ble Justice AR Lakshmanan, at para 5.
[8] *Supra* Note 3, at page 26.
[9] 1990 77 STC 182 AP.
[10] Section 5-E. Tax on the amount realised in respect of any right to use goods. - Every dealer who transfers the right to use any goods for any purpose, whatsoever, whether or not for a specified period, to any lessee or licensee for cash, deferred payment or other valuable consideration, in the course of his business shall, on the total amount realised or realisable by him by way of payment in cash or otherwise on such transfer or tansfers of the right to use such goods from the lessee or licensee, pay a tax at the rate of five paise in every rupee of the aggregate of such amount realised or realisable by him during the year : Provided that no such tax shall be levied if the turnover of the dealer including such aggregate is less than Rs. 1,00,000.

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petitioner, for the purpose of the steel project, allotted different works of the project to contractors. To facilitate the execution of work by the contractors with the use of sophisticated machinery, the petitioner undertook to supply the machinery to the contractors for the purpose of being used in the execution of the contracted works of the petitioner and received charges for the same. The respondents made provisional assessment levying tax on the hire charges under section 5-E of the Act. Therefore the writ petition was initiated against the respondents and the petitioner prays for a declaration that the tax levied under section 5-E of the Act on the hire charges, illegal and unconstitutional.

The Hon'ble High Court had laid down very important interpretations of the ownership, property and transfer of right to use. The Court observed:

"*An owner of property has a bundle of rights in it, namely, right to possess, right to use and enjoy, right to usufruct, right to consume, to destroy, to alienate or transfer, etc. In law it is not only possible but also permissible that the various rights and interest may be vested in various persons. While remaining the owner of a property, a person may create a charge on the property, mortgage it or lease it. In the transaction of sale, all the rights of the owner are transferred to the purchaser and it is said that the property in the goods passes to the purchaser. In a lease of immovable property, there is a transfer of a right to enjoy such property; a lease of land and a bailment of chattels are transactions of essentially the same nature.*" [11]

By allowing the petition the Hon'ble High Court gave a very exquisite reasoning as to the nature of contract, possession and effective control. "*The agreement has to be read as a whole, to determine the nature of the transaction. From a close reading of all the clauses in the agreement, it appears to us that the contractor is entitled to make use of the machinery for purposes of execution of the work of the petitioner and there is no transfer of right to use as such in favour of the contractor. We have reached this conclusion because the effective control of the machinery even while the machinery is in the use of the contractor is that of the petitioner-company (lender). The contractor is not free to make use of the same for other works or move it out during the period the machinery is in his use. The condition that he will be responsible for the custody of the machinery while the machinery is on the site does not militate against the petitioners' possession and control of the machinery. For these reasons, we are of the opinion that the transaction does not involve transfer of the right to use the machinery in favour of the contractor.*" [12]

In short, to constitute deemed sale, transfer of right to use coupled with the transfer of possession and effective control is to be present. Thus, if any of the requisites as stated above are missing then it will not amount to sale.

This reasoning is also upheld in the decision of *20th Century Finance Corpn. Ltd.v.State of Maharashtra*, [13] it was observed "*The State cannot levy a tax on the basis that one of the events in the chain of events has taken place within the State. The delivery of goods may be one of the elements of transfer of right to use, but the same would not be the condition precedent*

[11] *Supra* Note 9, at Para 5.
[12] *Supra* Note 9, at para 14.
[13] (2000) 119 STC 182: (2000) 6 SCC 12.

*for a contract of transfer of right to use goods*".

'**Right to possession**' and '**effective control**' together are the key elements, the presence or lack of which have to be established with reasonable certainty for a decision to be reached regarding whether the matter has to treated as a transaction of services or deemed sale. It is also clear that when both the '**right to possession**' and '**effective control**' of the tangible goods that have been supplied to another person for his use, is being retained by the supplier of goods, the situation become one where service tax rather than VAT liability is attracted.

This reasoning was accepted and pronounced in the case of *G.S. Lamba and Sons v.State of Andhra Pradesh*,[14] "*In the transaction for the transfer of the right to use goods, the delivery of goods is not a condition precedent, but the delivery of goods may be one of the elements of the transaction, the good should be available at the time of the transaction. The effective or general control does not necessarily mean physical control.*" [15]

## TRANSFER OF RIGHT TO USE AND ITS RELATIONSHIP WITH SERVICE TAX

Prior to 01. 07. 2012, the introduction of Finance Act, 2012, the transfer of right to use was introduced for the first time by introducing a new specific category of service i.e., '*Supply of Tangible goods Service'*.[16] This had expanded the scope of service tax and such taxable service which was defined under **section 65(105) (zzzzj)** reads as under:

"*any service provided or to be provided to any person, by any other person in relation to supply of tangible goods including machinery, equipment and appliances for use, without transferring right of possession and effective control of such machinery, equipment and appliances*".

It is also pertinent to mention that there was no definition of '**service**' prior to **1st July 2012**. For the first time in Finance Act, 2012, the definition of service is introduced under **Section 65B (44)**[17]. If we read the said definition as given under the Section, we will witness that the definition consists of three limbs, first is the '**meaning**', second is the '**inclusive part**' which lays stress on the issue, what includes a declared service, and the third being the '**exclusive part**' which clearly states, what is abstained from becoming a service.[18]

'**Service**' has been defined in clause (44) of the new **section 65B** and means:

- any activity;
- for consideration;
- carried out by a person for another;
- and includes a declared service.
- The said definition further provides that '**Service**' does not include:
- Any activity that constitutes only a transfer in title of (i) goods or (ii) immovable property by way of sale, gift or in any other manner

[14] (2011) 43 VST 323 (AP).
[15] *Id*, at Para 26.
[16] Inserted (w.e.f. 16.05.2008) by s. 90 of the Finance Act, 2008 (18 of 2008).
[17] Inserted (w.e.f. 1.7.2012) by s.143 of the Finance Act.. 2012 ( 23 of 2012).
[18] See Taxation of Services: An Education Guide, June 20, 2012, TAX RESEARCH UNIT Central Board of Excise & Customs, Department of Revenue, Ministry of Finance Government of India New Delhi, at Page 5.

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- (iii) A transfer, delivery or supply of goods which is deemed to be a sale of goods within the meaning of clause (29A) of article 366 of the Constitution.
- A transaction only in (iv) money or (v) actionable claim.
- A service provided by an employee to an employer in the course of the employment.
- Fees payable to a court or a tribunal set up under a law for the time being in force. [19]

In the exclusive section it is mentioned that deemed sale as per the Article 366 (29A) will not be considered as a service, and hence will be excluded from the definition of the service. When '*transfer of right*' takes place it is to be considered as '*deemed sale*'. Article 366 (29A) (d) is completely divorced from the definition of '*service*'. As the query is related with the '*transfer of right to use'* in respect of advertisement hoardings, we are only talking about the '*sale*' or '*deemed sale*' as covered under the *Article 366 (29A) (d)*. If it is proved that there exists a transfer of right to use then we are not supposed to touch the Service aspect, but rather the sale aspect only. If the right to use has been transferred along with effective control and possession then it would fall under the Sales Tax Act or law, else it would fall under Service tax law if the nature of the transaction indicated service. The said abstinence to exclude the service tax from the '*transfer of right to use'* is also because of the negative list as discussed above.

## THE RELATIONSHIP BETWEEN VAT AND SERVICE TAX

The Judgement pronounced in *All India Federation of Tax Practitioners v. Union of India*[20] the Hon'ble Supreme Court held that the concept of service tax lies in economics. It is an economic concept. It has evolved on account of Service Industry becoming a major contributor to the GDP of an economy, particularly knowledge-based economy. With the enactment of Finance Act, 1994, the Central Government derived its authority from the residuary Entry 97 of the Union List for levying tax on services. The legal backup was further provided by the introduction of Article 268A in the Constitution which stated that taxes on services shall be charged by the Central Government and appropriated between the Union Government and the States. Simultaneously, a new Entry 92C was also introduced in the Union List for the levy of service tax. As an economic concept, there is no distinction between the consumption of goods and consumption of services as both satisfy human needs. It is this economic concept based on the legal principle of equivalence which now stands incorporated in the Constitution. Further, it is important to note, that *'service tax' is a value added tax* which in turn is a general tax which applies to all commercial activities involving production of goods and provision of services. Moreover, VAT is a consumption tax as it is borne by the client. [21]

Both Sales Tax and Service Tax are a form of Value Added Tax. There is a hair line dif-

19 *Id.*
20 AIR 2007 SC 2990.
21 *Id.*

ference when it comes to determine the applicability of either of the two. All India Federation of Tax Practitioner's reasoning was also accepted in the case of *Association of Leasing & Financial Service companies v. Union of India and Others,* [22] a three judge bench of the Apex Court pronounced the following:

"*Today with the technological advancement there is a very thin line which divides a 'sale' from 'service'. That, applying the principle of equivalence, there is no difference between production or manufacture of saleable goods and production of marketable/saleable services in the form of an activity undertaken by the service provider for consideration, which correspondingly stands consumed by the service receiver. It is this principle of equivalence which is inbuilt into the concept of service tax under the Finance Act, 1994. Service tax is, therefore, a tax on an activity. Service tax is a value added tax. The value addition is on account of the activity which provides value addition, for example, an activity undertaken by a chartered accountant or a broker is an activity undertaken by him based on his performance and skill. This is from the point of view of the professional. However, from the point of view of his client, the chartered accountant/broker is his service provider. The value addition comes in on account of the activity undertaken by the professional like tax planning, advising, consultation etc. It gives value addition to the goods manufactured or produced or sold. Thus, service tax is imposed every time service is rendered to the customer/client. Thus, the taxable event is each exercise activity undertaken by the service provider and each time service tax gets attracted.* [23]

The same view is reiterated broadly in the earlier judgment of the Supreme Court in *Godfrey Phillips India Ltd.v.State of U.P.* [24] in which a Constitution Bench observed that in the classical sense a tax is composed of two elements; the person, thing or activity on which tax is imposed. Thus, every tax may be levied on an object or on the event of taxation. Service tax is a tax on activity whereas sales tax is a tax on sale of a thing or goods.

## THE TAX IMPLICATIONS ON TRANSFER OF RIGHT TO USE IN RESPECT OF ADVERTISEMENT HOARDINGS, PANELS, BOARDS, ETC

The concept of '*transfer of right to use*' was explained above so that the tax implications, be it Service or Sales, could be understood crystal clearly. This topic is divided into two limbs:

1. When will the Service Tax be levied?
2. When will the Sales tax be levied?

Answer to both questions lies in the nature of contract, the intention of the parties, i.e., the Dominant Intention Test and understanding of '*transfer of right to use*'. The Negative List has mentioned a stand which is, if there is an existence of *'transfer of right to use'* which is also considered as sale according to the **Article 366 (29A) (d)** then the Sale of space or time slots for advertisement other than the advertisement broadcast by radio will not be

[22] 2010-TIOL-87-SC-ST-LB.
[23] *Id,* at Para 22.
[24] [(2005 (2) SCC 515].

exigible to Service Tax.[25] The definition of '*Service*' as present under the **Section 65 B (44),** [26] Article 366 (29A) (d) is enunciated in the exclusive part, making it very clear that '**transfer of right to use**' which is considered '**sale'** will not attract the definition of '**Service**' and hence will not be eligible for Service Tax. It will be no wrong to state that Sales Tax will be levied on such transactions.

Under the Finance Act, 2012, Section 65, taxable services are defined, which states what are taxable services and what all are covered within it. Section **65 (105) (zzzm)** comes within their ambit, and it states the following "*to any person, by any other person, in relation to sale of space or time for advertisement, in any manner; but does not include sale of space for advertisement in print media and sale of time slots by a broadcasting agency or organisation*". [27]

Therefore if the condition present as per the definition of such taxable service is fulfilled, then the Service Tax will be levied. Therefore the said definition is also complimentary to the Negative list as introduced in Finance Act, 2012.

Moving on, there is one more provision of under the Finance Act, 2012, which is Section 66E, that has defined what is meant by 'Declared Service'. The relevant sub sections for the purpose of this article are "*(f) transfer of goods by way of hiring, leasing, licensing or in any such manner without transfer of right to use such goods; (g) activities in relation to delivery of goods on hire purchase or any system of payment by instalments; (h) service portion in the execution of a works contract*". [28] Hence the definition of declared service clearly points out that any transfer of goods by way of hire, leasing, licensing, delivery of goods on hire purchase, shall attract Service Tax and not Sales Tax.

By interpreting the said Section we can very well conclude that showcases in railway stations or cinema halls displaying the products of various organisations placed on a board or hoarding or huge advertisement boards displayed on open terraces of a building, if taken by way of hire or lease without transferring the right to use will be exigible to Service Tax.

There was a hair line difference between the two namely Sales and Service Tax. The definition given under the Finance Act, 2012, in a great deal, has made a good contribution in differentiating what amounts to Sale and Service. Only one concept needs to be proved which is, 'transfer of right to use'. If hiring or leasing or licensing is coupled with the transfer of right to use then there will be no levy of Service Tax, the entire transaction will be exigible for Sales Tax. Two cases namely, *Selvel Advertising Private Limited v. Commercial Tax Officers* [29] and *Upasana Finance Ltd. v. State of Tamil Nadu*,[30] are important to discuss because their facts and circumstances will help a better understanding of 'Declared Service'.

[25] See *Supra* Note 1.
[26] *Supra* Note 17.
[27] Inserted (w.e.f. 01.05.2006) by s. 68 of the Finance Act, 2006 (21 of 2006).
[28] Inserted (w.e.f. 1.7.2012) by s.143 of the Finance Act.. 2012 ( 23 of 2012) .
[29] [1993] 89 STC 1.
[30] [1999] 113 STC 0403.

## CASE ANALYSIS

In the case of The State of *Tamil Nadu v. Tvl. Jayalakshmi Enterprises*[31] the assessee herein was engaged in the business of offering publicity services. They had already put up structures and advertisement boards at their own cost in a leased out premises. The assessee herein leased out its right to use the hoardings its structure to different companies during the currency of lease. The Assessee submitted that even by allowing the parties to occupy the spaces for putting up advertisement boards, they would continue to have the possession and control over the property. Hence there was no transfer of right to use goods as it had been contemplated under Section 3A of the Act.[32] On further appeal by the Revenue before the Sales Tax Appellate Tribunal, the Tribunal rejected the Appeal of the Revenue and held that there was no transfer of possession of the hoardings which were erected on the earth on concrete foundation, the hoardings thus being a part of immovable property. [33]

Tribunal in this case could reach the conclusion by the following observations:

i. The hoardings are erected in the earth on concrete foundations. They cannot be removed without causing damage to hoardings.

ii. Transferee does not physically possess the hoardings.

iii. Entire maintenance and upkeep of hoardings is done by Respondent only.

iv. The job of painting the designs or display matter is also done by the Respondent.

v. The Respondent is also responsible for damages for fall of hoardings and has to carry out necessary periodical repair work for keeping them in good conditions.

vi. Entire licence charge to Chennai Corporationand insurance was paid by the Respondent only. [34]

Therefore the Hon'ble High Court of Madras adhered with the judgement of the Tribunal and rejected the Appeal of the Revenue on grounds of the same reason as listed above. There should be an effective control and transfer of right to use which in this case are not present.[35] Therefore no Sales tax is to be levied.

In *State of Andhra Pradesh v. Prakash Arts,*[36] the issue before the Hon'ble High Court was whether the leasing out of the advertisement hoardings would warrant the levy of tax under Section 5E of the Andhra Pradesh General Sales Tax Act, 1957. It was held, question was no longer an untouched matter. They followed the decision in *Rashtriya Ispat Nigam Ltd .v. Commercial Tax Officer*,[37] where it was held that

31 T.C. (Revision) No. 430 of 2006 Decided On: 07.07.2011
32 Tamil Nadu General Sales Tax Act - Section 3 A.
33 *Supra* Note 27, at Para 2.
34 *Id*, at Para 6.
35 *Id*, at Para 9.
36 (2008) 18 VST 39 (AP).
37 *Supra* Note 9.
38 T. No. 997 of 2007 Decided On: 29.07.2013.
39 *Id*, at Para 6.

the nature of transaction had to be looked into and established and where there was no transfer of right to use and it was only for the hire charges, the same could not be taxed with Sales Tax.

In another case namely, *Unique Inflatables Limited v. State of Andhra Pradesh*,[38] there existed a hire contract where there was no transfer of rights but the Commercial Tax officer was levying Sales Tax, as the contract was wrongly interpreted to be a contract where transfer of right to use had taken place. In this case balloons, inflatables and bouncies were installed by the appellants as per the requirements of the customers at the sites located by the customers for display containing logos and advertisement material of the customers. Thus, the entire work of installation and monitoring the display was done by the appellant and after conclusion of the display period, the balloons, inflatables and bouncies were taken back to the factory. So, in these transactions, there is no transfer of right to use goods by the appellant to the customers. The amounts realized from the customers were only charges for display of balloons, inflatables and bouncies with logos of the customers for advertising purpose and there being no usage of the goods by the customers, as no effective control or right to use those balloons, inflatables and bouncies are transferred to the customers at any point of time, suggests that the appellant retained possession of those balloons, inflatables and bouncies with itself to monitor their display at specified timings and specific places as selected by the customers.[39]

In *Selvel Advertising Private Limited v. Commercial Tax Officers*,[40] as referred above Applicant was an advertising agency, which acquired land on lease and then erects structures or hoarding and let out the same for advertising on payment of rent. Applicant pays rent for site or premises for the period of lease to the landlords and '*leases out the right to use the hoarding*' to different companies for a certain period of time. Company possesses the right to use the hoarding structures for advertising their products and pays rent to the applicant.

There should be delivery of the goods and there should be freedom to use such goods have to be fulfilled to constitute sale. In the instant case the hoarding are let out to the customers, who possess them for the relevant period, and are allowed to be freely used for the purpose of displaying advertisement as per terms of the contract. [41] If the advertisers are granted an exclusive right to use the hoarding and if no right is reserved to the Lessor for interfering with that right, it is case of sale. Therefore, it may be given on lease or rent, but it the transfer is also coupled with the right to use, all the ingredients of sale is present and Sales Tax will be levied. The said facts of this case are against the definition of '*Declared Service*' given under Section 66 E (f), as there is an element of transfer of right to use along with lease. Hence there is no applicability of Service Tax.

[40] *Supra* Note 29.

[41] As pronounced In The Court of Commissioner Department of Trade & Taxes Government of NCT of Delhi VyaparBhawan: New Delhi, No. : 287/CDVAT/2011/04, Dated : 06.04.2011.

[42] *Supra* Note 30.

[43] *Supra* Note 5.

In *Upasana Finance Ltd. v. State of Tamil Nadu*,[42] the applicant is an advertising agency, which erects hoarding and lets the same on hire for display of advertisement. Hon'ble Tribunal held that the hire charges, which a person collects for the transfer of right to use hoarding, are not subject to a Services Tax on advertisement. On facts it has to be found whether a person who erects the hoardings only lets on hire the hoardings for display of advertisement or whether he also undertakes the job of designing the advertisement and painting the hoardings. Even here the two transactions are clearly separable. For hire charges of the hoardings, the person who erects is certainly liable to be taxed under section 3-A. This will depend upon facts of each case.

## CONCLUSION

By discussing the relevant statutes and the case laws, the distinction between the levy of Sales Tax and Service Tax is highlighted. The most important of all concepts to perceive was of '*transfer of right to use*'. The said terminology determines the applicability of the Sales or Service Tax. The **Article 366 (29A) (d)** [43] enunciates that where there is a transfer of right to use, it will come under the ambit of sale. Whereas, the Finance Act of 2012 have made a great distinction between sale and service aspect. The relevant Sections of Finance Act, 2012 are, **Section 65 (105) (zzzm)** [44] which is under the '**taxable service definition**', **Section 65B** [45] definition of service and **Section 66E** [46] '*declared service*'. In all these sections of the Finance Act, 2012, the term transfer of right to use has been isolated from the ambit of Service.

When the sale of space for advertisement hoardings, panels, boards, comes into lime light, then one has to see the nature of transaction between the parties. This will imply that the '*Dominant Intention Test'* should apply. The Dominant Intention of the parties can only be understood yet again by the nature of Contract and transaction. In the case of *BSNL v. Union of India* [47] what amounts to transfer of right to use was exhaustively discussed by Hon'ble Justice AR Lakshamanan. The said requisites are to be applied to know that whether the transaction is of '*transfer of right to use'*, after this the intention of the parties will be elucidated and hence one can apply the said principle to determine that Sales Tax will be levied.

Therefore, just like in the case of ***Upasana Finance Ltd*** [48] and ***Selvel Advertising Pvt Ltd***[49], there was a lease agreement but at the same time the agreement was coupled with '*transfer of right to use*' hence, the intention of the parties was to give the Lessee absolute right by not allowing the Lessor to interfere in the Lessee's enjoyment. Hence there was a complete transfer of right, therefore the Hon'ble Courts in these two cases allowed the Sales Tax to be exigible. There is yet another case, ***Unique Inflatables Ltd***,[50] where the balloons or inflatables were delivered to the contracting parties, by there was no transfer

[44] *Supra* Note 27.
[45] *Supra* Note 17.
[46] *Supra* Note 28.
[47] *Supra* Note 6.
[48] *Supra* Note 30.
[49] *Supra* Note 29.
[50] *Supra* Note 38.

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of right to use. Their balloons were available with the clients who will put up their advertisement but on lease or on rent without getting the transfer of right to use. There was an element of '*possession*' but no such element of 'effective control'. Therefore, such example attracts the provisions of '*declared service*' as defined under Section 66 E of the Finance Act, 2012. Hence such transactions will be exigible to Service Tax.

We can very well witness that it is indeed the nature of transaction which is affecting the levying of Service or Sales Tax. It is the intention of the parties which compliments or contradicts the levy of either of the taxes. As per the judgement of ***Rashtriya Ispat Nigam Limited,***[51] the agreement has to be read as a whole, to determine the nature of the transaction.

With the advent of Negative List and the relevant Sections, as discussed above, incorporated in Finance Act of 2012, a clear distinction is made on the tax implications on transfer of right to use in respect of advertisement hoarding, boards, panels etc.

51 *Supra* Note 9.

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# HUMAN RIGHTS AND PRISON MANAGEMENT

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ABSTRACT

Prison is a place where the criminal justice system put its entire hopes. The correctional mechanism, if fails will make the whole criminal procedure invain. The doctrine behind punishment for a crime has been changed a lot by the evolution of new human rights jurisprudence. The concept of reformation has become the watchword for prison administration. Human rights jurisprudence advocates that no crime should be punished in a cruel, degrading or in an inhuman manner. On the contrary, it is held that any punishment that amounts to cruel, degrading or inhuman should be treated as an offence by itself. The transition caused to the criminal justice system and its correctional mechanism has been adopted worldwide.

Internationally, it becomes a well accepted rule that the correctional mechanism in criminal justice administration should comply with reformative policies. There are a set of rights identified by the international legal system so as to save the human dignity and value of prisoners and there by the reformative theme of correction. It is also strongly argued that the community can never tolerate a scheme of correction that does not maintain a connection with the evilness of the crime done. Thus punishment always maintains a subjective perspective. The rights of the imprisoned person have to be read despite of this perception. It is truly meant that there can be varied punishments for same offence; but one should not be treated bad while the sentence once declared by the court goes on. In this purview, the rights guaranteed under the international legal system is to be looked into and legislative concern for the same in India[1].

**Key Words :** Prison, Human Rights Jurisprudence Advocates, Criminal Justice System, Reformative Policies.

PAGE : 08 REFERENCES : 11

## INTRODUCTION

### Definition of Prison

The term prison has been defined by the Prisons Act, 1894 in an exhaustive manner. Prison can be any place by virtue of a government order being used for the de-

[1] Human Rights and Humanitarian law – Developments in India and International Law South Asia Human Rights Documentation Centre (SAHRDC).

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tention of prisoners. Thus even a jail will come under the definition of prison according to this definition. Similar definition has been given to prison by Prisoners Act, 1900. These two enactments still remains the basic premises by which the administration of prison has been regulated. The Prisons Act excludes police custody and subsidiary jails from the meaning of the word prison.

International human rights law also developed its own conception for the term prison. According to them prison can be only a place for the treatment of convicted persons. According to the human rights law for the protection of imprisoned person, imprisoned person means a person deprived of personal liberty as a result of his conviction on any offence and imprisonment means such condition of an imprisoned person.This will help to give clearer picture with regard to the issues faced by a prisoner in general, an under trial prisoner and a detained person.

The modern idea about prison has been envisaged by judges through the decision making process. Even the concept of open jails has been evolved by time. No longer can prisons be called as an institution delivering bad experiences. A reformative philosophy, rehabilitative strategy, therapeutic prison treatment and enlivening of prisoner's personality through a technology of fostering the fullness of being such a creative art of social defence and correctional process activating fundamental guarantees of prisoner's rights is the hopeful note of national prison policy struck by the Constitution and the court. Thus now all the dignity that human holds can also be availed inside the four walls of prison[2].

The traditional definition and concept about the prison is unfit for the time. Prison life takes away many freedoms from an inmate like; liberty, heterosexual relations, security autonomy and so on. The human rights jurisprudence contributed much for the penal reforms and the same had its impact in India. The penal reforms made all over the world have its impact in India too. The concept of penal reform had its birth from the reformative theory of punishment. Prison of the time should have a meaning that incorporates the reformative values into it. The reformative aspect thinks of incorporating humane values into the prison system and the prison officials have to work for the achievement of the same. The extent of protection assured by the legal system for the reformative treatment of prisoners should be made under a National legal frame work and India lacks the same.

## Legal Framework on Prisoner's Rights

Indian Constitution intimates prison administration as a portfolio of State to legislate on. The fundamental responsibility of prison management is to secure custody and control of prisoners. Legislations if made by the States will always lack the unique standards for the protection of prisoner's rights. There should be a National policy frame work that substitutes the varying State legislations. It is true that the system normally demands for reformative framework that too one in tune with the international human rights law. This objective can be easily achieved by a national legislation rather through vary-

[2] Hand Book of Human Rights and Criminal Justice in India – Second Edition – SAHRDC.

ing State laws. India still runs with century old legislation for prison administration. Prisons Act is only concerned about the classification and segregation of prisoners by their nature and status of imprisonment. It failed to incorporate many of the principles laid down by the judiciary into its premises as well as recommended by the human rights law. Prisons Act also attempt to cast the responsibility of prison administration over the State. Even the solitary confinement is still retained in the Act against which the judiciary had made their vehement dissent. The liberty to move, mix, mingle, talk, share company with co-prisoners if substantially curtailed would be volatile of Art. 21, unless the curtailment has the backing of law and this law should lay down a fair, just and reasonable procedure [3].

Prisons Act is also concerned about the prisoner's right to and meet visitors but that too is confined to under trial prisoners and civil prisoners.The concept of prison labour and earning are very vague from the Act. State on the other side, follows different practices in prison administration. Moreover the prison environment is an unseen one and that makes things more complicated. To conclude over the approach of the Act, it is important to point out that it still maintains separate confinement as a punishment for the offences done inside the prison.This indicates that the strategy of rehabilitation and reformation still have to be made into the Act.

## Role of Judiciary in Prison Administration

The Indian system of prison administration was restructured and modified by the judiciary. Many of the rights assured to prisoners were incorporated into Indian legal system by the judiciary.

The Supreme Court of India, by interpreting Article 21 of the Constitution, has developed human rights jurisprudence for the preservation and protection of prisoner's rights to maintain human dignity. Any violation of this right attracts the provisions of Article 14 of the Constitution, which enshrines right to equality and equal protection of law. In addition to this, the question of cruelty to prisoners is also dealt with, specifically by the Prison Act, 1894 and the Criminal Procedure Code (CRPC). Any excess committed on a prisoner by the police authorities not only attracts the attention of the legislature but also of the judiciary. The Indian judiciary, particularly the Supreme Court, in the recent past, has been very vigilant against violations of the human rights of the prisoners. The Supreme Court and the High Courts have commented upon the deplorable conditions prevailing inside the prisons, resulting in violation of prisoner's rights. Prisoner's rights have become an important item in the agenda for prison reforms. The need for prison reforms has come into focus during the last three to four decades.

## Reformation as the Objective of Punishment

Krishna Iyer, J. was the person who advocated strongly for orienting reformative treatment of prisoners. In all his judgments he tried to incorporate reformative values into the prison administration. The concept of crime was also redefined by the judges of his time. It was observed that

[3] *Sunil Batra v. Delhi Administration* A.I.R. 1978 S.C.1675..

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Crime is a pathological aberration that the criminal can ordinarily be redeemed that the State has to rehabilitate rather than avenge. The sub-culture that leads to anti-social behavior has to be countered not by undue cruelty but by re-culturisation. Therefore, the focus of interest in penology is the individual and the goal is salvaging him for society. The infliction of harsh and savage punishment is thus a relic of past and regressive times.

The above judgment conveys the right influence of international human rights doctrine over the Indian judiciary. The Court in the Giasuddin emphasized on the Gandhian approach of treating offenders as patients and therapeutic role of punishment. The Supreme Court after considering all the circumstances of the appellant directed that the sentence should be reduced to 18 months. The court also directed, guarded parole release every 3 months for at least a week punctuating the total prison term and assignment of suitable mental cum-manual work and payment of wages in jail. The appellant was ordered to pay fine of Rs. 1200/- to be made over to the victim of deception under Section 357 of the Cr. P. C. Krishna Iyer, J. delivering the judgment also pointed out that the judge must use wide range of powers in reformatting the criminal before him. Thus the concept of reformation was planted even out of the four walls of prison by this judgment.

## Free From Torture and Cruel Treatment

Supreme Court in many instances made it clear that the prison treatment should not cause any kind of torturous effect over the inmates. Even the practice of separate confinement and solitary confinement was deeply discouraged by courts at many instances. The court clearly pointed out that the prison authorities cannot make prisoners to solitary confinement and hard labour [4]. As to ensure the prison practices the Supreme Court in this judgment also directed the district magistrates and sessions judges to visit prisons in their jurisdiction and afford effective opportunities for ventilating legal grievances. They were to make expeditious enquiries and take suitable remedial action. Thus the concept of judicial policing was recognized by the Supreme Court through this judgment. Discussing on the same premise the court vehemently criticized the practice of using bar fetters unwarrantedly [5].The court held the treatment of a human being which offends human dignity, imposes avoidable torture and reduces the man to the level of a beast, would certainly be arbitrary and questionable under Art. 14. Thus putting bar fetters for a usually long period, day and night, and that too when the prisoner is confined in secure cells from where escape is somewhat inconceivable without any due regard for the safety of the prisoner and the security of the prison is not justified. Judicial interferences of this kind coined many rights for the prisoners which will not be unless ever possible. It will be nice to quote Krishna Iyer, J. at this instance. He remarked society must strongly condemn crime through punishment, but brutal deterrence is fiendish folly and is a kind of crime by punishment. It frightens, never refines; it wounds

[4] *Sunil Batra v. Delhi Administration,* A.I.R. 1980 S.C.1579.
5 *Sunil Batra v. Delhi Administration,* A.I.R. 1980 S.C.1579.

never heals. The message of reformation through prison treatment has to be there in every measures adopted by the authorities. The human right to be safe in prisons as mandated by the international human rights law is being incorporated into Indian law by judicial initiatives. International law gives widest possible protection to the prisoners from torture and that kind of a protection can only be accommodated by legislature.

## Mal-Administration In Prison

Every prisoner has the right to enjoy all the rights entrusted to a normal human being subjected to reasonable restrictions by the international human rights law.The prison authorities are bound to look after the management of prisons with this outlook. So it can be powerfully argued that any lapses in the management of prison will also cause infraction over the human rights of prisoners. The view of Indian judiciary also accompanies this view to a greater extent. Talking about the mismanagement in prison, apart from the official lapses the maintenance of discipline between the prisoners will also be of high concern. The Indian prison experiences even made the Supreme Court to ask whether the prison term in Tihar jail is a post graduate course in crime. Serious allegations were made against the unhealthy relations between jail authorities and criminals and thereby causing certain kind of misappropriations of jail funds. The same have been going on in the present days and only few years back, the Supreme Court ordered to launch a prosecution against certain Superintendents and other jail officials for offences punishable under Ss. 120B, 217 & 218 of the Indian Penal Code. [6] Concluding the judgment in Asha Arun Gawali, court shockingly observed that: ...norms relating to entry of persons to the jail, maintenance of proper records of persons who entered the jail have been observed more in breach than in observance and the rules and regulations have been found thrown to the winds ... What is still more shocking is that persons have entered the jail, met the inmates and hatched conspiracies for committing murder. The High Court appears to have justifiably felt aghast at such acts of omissions and commissions of jail officials which per–se constituted offences punishable under various provisions of the IPC and has therefore, necessarily directed the launching of criminal prosecution against them, besides mulcting them with exemplary costs. The message of reformation is indefensibly spoiled at the consent and convenience of jail authorities and the same went against the basic aspirations of human rights law.

The court in many instances stressed on the need to provide proper atmosphere, leadership, environment situations and circumstances for re-generation and a reformatory approach [7]. Illegal accomplice between criminals and prison officials make all these aims invain.

## Freedom of Speech and Expression

Prisoners alike others can access many human rights made in Universal Declaration of Human Rights and international covenants. Indian judiciary had also recognized the right of a prisoner to enjoy the right to freedom of speech and ex-

[6] (*State of Maharastra v. Asha Arun Gawali,* A.I.R. 2004 S.C. 2223.

[7] *Sanjay Suri v. Delhi Administration,* A.I.R. 1988 S.C. 414.).

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pression. It is interesting to note that the judiciary took such a view before the Kesavanada Bharathi judgment came and evolution of the concept of justice as fairness. Alongside with this, it is worthwhile in discussing the judicial declaration of the right of press to interview prisoners. This judgment has certain implications over the right of prisoners in exercising their right to freedom of speech and expression. A Writ Petition filed under Art. 32 by the Chief reporter of Hindustan Times Smt. Prabha Dutt seeking a writ of mandamus or order directing the respondents Delhi Administration and Superintendent, Tihar jail to allow her to interview two convicts Billa and Ranga who were under a sentence of death, whose commutation petition to the President were rejected.[8] The Court held the restricted right to interview the prisoners subject to their willingness to attend the same. The freedom of press person to interview an under trial prisoner will not be alike that of the prisoner sentenced to death. Supreme Court remarked that the right to interview a prisoner will not become an exclusive right as in the case of life convict and it should be decided on merits depending on each case [9].

## Right To Have Healthy Atmosphere In Prison

The Supreme Court identified nine major problems afflicted upon the prison system, namely, overcrowding, delay in trial, torture and ill-treatment, neglect of health and hygiene, insubstantial food and inadequate clothing, prison vices, deficiency in communication, streamlining of jail visits and management of open-air prisons. Among this, an unhealthy living premise inside the jail was identified by the Court as a severe problem [10]. The court herein also pointed out the need for providing adequate amenities by the state for the prisoners in advancement of their living conditions inside the prison. A decade after this judgment situation remained the same and the same was revealed before the court by another judgment. The bitter experiences of the prisoners were made through a letter by one of the prisoners P. Bharathi of central Prison, Puducherry to one of the Honorable Judges of Supreme Court. The letter was ordered to be treated as a writ petition. It talked about the poor hygienic condition and maintenance inside the prison and also restrictions on the visit by relatives of the prisoner. There was no toilet facility inside the cell to answer the call nature during night time. Two plastic buckets with lid was provided for this purpose during night time and in the next day morning, the buckets containing excreta are made to be cleaned by the inmates of the cell on turn basis. This was made as per the existing prison rules and the authorities accepted that the rules require a radical change to fall in line with present day requirements. This judgment will help to realize the disparities in state legislations as well as the need for a centralized legal framework in regulating the prison affairs.

## Right to Legal Aid

In *Madhav Hayawadan Rao Hosket v. State of Maharashtra*, a three judges bench (V.R. Krishna Iyer, D.A. Desai and O. Chinnappa Reddy, JJ) of the Supreme Court read-

[8] (*Prabha Dutt v. Union of India,* A.I.R. 1982 S.C.6.).
[9] (State, through *Supdt. Central Jail New Delhi v. Charulatha Joshi and another*, A.I.R. 1999 S.C. 1379)
[10] (*Ramamurthy v. State of Karnataka,* (1997) S.C.C. (Cri) 386).

ing Articles 21 and 39-A, along with Article 142 and section 304 of Cr. PC together declared that the Government was under duty to provide legal services to the accused persons.

## Narco Analysis /Polygraph/ Brain Mapping

In *Selvi Vs State of Karnataka,* (2010), the Supreme Court has declared Narco analysis, Polygraph test and Brain Mapping unconstitutional and violative of human rights. This decision is quite unfavourable to various investigation authorities as it will be a hindrance to furtherance of investigation and many alleged criminals will escape conviction with this new position. But the apex court further said that a person can only be subjected to such tests when he/she assents to them. The result of tests will not be admissible as evidence in the court but can only be used for furtherance of investigation.

With advancement in technology coupled with neurology, Narcoanalysis, Polygraph test and Brain mapping emerged as favourite tools of investigation agencies around the world for eliciting truth from the accused. But eventually voices of dissent were heard from human rights organizations and people subjected to such tests. They were labelled as atrocity to human mind and breach of right to privacy of an individual. The Supreme Court accepted that the tests in question are violative of **Article 20 (3)**, which lays down that a person cannot be forced to give evidence against himself. Court also directed the investigation agencies that the directives by National Human Rights Commission should be adhered to strictly while conducting the tests. These tests were put to use in many cases previously, Arushi Talwar murder Case, Nithari killings Case, Abdul Telagi Case, Abu Salem Case, Pragya Thakur (Bomb blast Case) etc. being ones which generated lot of public interest.

## On Prison Labour

Prison labour also involves certain human right issues. The extent of labour given for a prisoner will vary depending upon the punishment and nature of imprisonment. Any how prison labour must be understood as a tool for reformation instead of taking it as a form of punishment. Indian legal system always measures it as method to implement rigorous imprisonment made by the court. The issue in relation to improper remuneration was raced before Indian judiciary.

Accommodating the prisoners for the most suited job was well identified in the early periods itself. Following this doctrine Krishna Iyer, J. in a leading case *law directed the prison authorities to engage a convict in agriculture* as he traditionally belongs to that sector of the society.[11] The Court further concluded the objective of prison labour as when prisoners are made to work, a small amount by way of wages could be and should be paid so that the healing effect on their minds is fully felt. In this judgment, the court recommended to the State concerned to make law for setting apart a portion of wages earned by the prisoners to be paid as compensation to the deserving victims, of the offence, the commission of which entailed the sentence of imprisonment to the prisoner either directly to through a common fund to be created for this purpose or in any

[11] (*Darambir & Another v. State of Uttar Pradesh,* (1979) 3 S.C.C. 645. ).

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other feasible mode. Glorifying the extent of right to dignity the Court observed that the right to dignity and fair treatment under Art. 21 of the Constitution of India is not only available to a living man but also to his body after his death. The jail authorities in the country shall not keep the body of any condemned prisoner suspended after the medical officer has declared the person to be dead. The limitation of half an hour mentioned in para 873 of the Punjab Jail manual is directory and is only a guideline. The only mandatory part of the above quoted para is that the condemned person has to be declared dead by the medical officer and as soon as it is done the body has to be released from the rope. The inherent quality of every human life is there with the prisoners. Judiciary cannot give any ultimate protection to the prisoners as it can only look upon the matters made to them. Nation should develop a new legal framework within which the prison administrations enhance. The so developed National law should encompass all the above mentioned legal rights propounded by the judiciary along with the International human rights guarantee. National Human Rights Commission had made some unsuccessful attempts to this regard.

### Lacunae In Legislations

Normally the recommendations by the State secretaries were the premise from which the prison reforms were introduced. This was changed by the introduction of Mulla Committee on Jail Reforms. The committee headed by Mulla made a National Policy on Prisons. It also advocated for the constitution of a National Commission on prison. It took more than a decade for the Indian legal system to draft some law on the Mulla recommendations. The bill so prepared was well supported by the draft bill made by the National Human Rights Commission. The Commission made follow up over the 1996 bill and developed another model bill within a period of two years. This bill made by Commission attempted to consolidate the entire developments made in India after Mulla recommendations. Stepping with NHRC; Government of India drafted a new bill in the same year. This bill was identified as a consolidated version of Indian laws on prison. But still it remains as a dream as it is keep away from parliament.

## CONCLUSION

Despite the inadequacies in legislations, the judiciary on its own creative spirit had contributed much to prison administration thereby ensuring fundamental human rights of prisoners. Many of those rights were recognized by the International human rights law. Any change brought out in a penal system cannot be called as penal reform. The concept penal reform had changed in way that there should always be a nexus between penal reform and the reformatory theory of punishment.

The era of hands-off doctrine in prison administration is left behind in the history all over the world and now it is always a matter of judicial scrutiny. Indian prisons are equally corruptive; like any other public institutions. The new law should be also careful to cure the menace of corruption from the prisons. It is true that the prisoner is far more likely to be reformed if he can recognize the justice of the penalty than if he cannot. Law on prisons should always find a free space in itself for the treatment of prisoners based on their conviction.

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*The oaks and the pines, and their brethren of the wood,*
*have seen so many suns rise and set, so many seasons come and go,*
*and so many generations pass into silence,*
*that we may well wonder what "the story of the trees" would be to us*
*if they had tongues to tell it, or we ears fine enough to understand.*
*~ Author Unknown,*
*quoted in Quotations for Special Occasions by Maud van Buren, 1938 ~*

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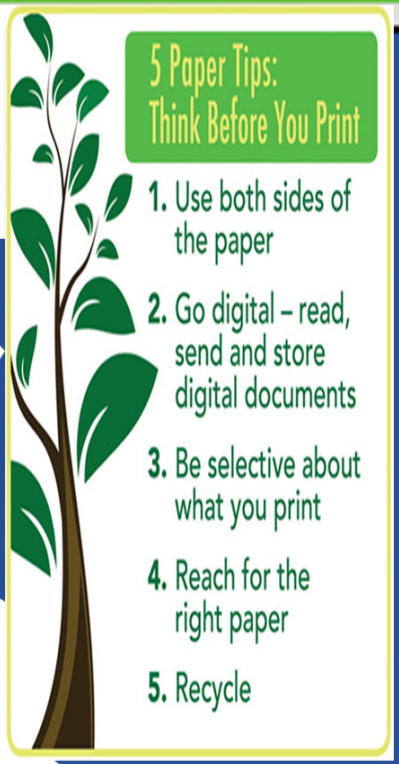


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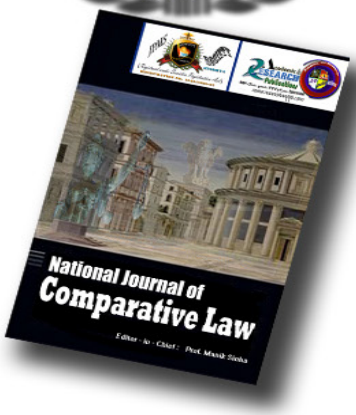

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*He has also held the position of Head and Dean, Faculty of Law, and Registrar of BHU. He has visited several universities in USA and UK and deeply interacted with their students and faculty. He has published over sixty articles, reviewed ten books, edited four books and authored two books. His teaching interests include Constitutional Law, Environmental Law and Law of Education. He is a member of the Environment Law Commission, Switzerland, International Council of Environmental Law, Germany, and is also on the General Council of Ram Manohar Lohiya National Law University, Lucknow.*

# Profile, MANIK SINHA, Editor-in-Chief

*MANIK SINHA ( MANIK CHANDRA SINHA ) s/o Late Prof. J.P. Sinha, M.Sc., LL.M. (Banaras Hindu University),* ***Former-Dean, Faculty of Law****, Dr. R.M.L. Avadh University, Faizabad,* **SENIOR ADVOCATE, GOVT.OF INDIA, High Court, Lucknow** *and Former- Hony.* ***Juvenile Magistrate (1st Class), Juvenile Court****, Faizabad for 15 years since 25-10-1988.*

*Enrolled as an* **Advocate by the U.P. Bar Council** *, Allahabad on 19-03-1993. Advocate, High Court, Lucknow Bench, Lucknow. About 32 years standing with specialization in Constitutional Law, Service Laws and Income Tax matters for last more than about 30 years.*

*Contested over one dozen landmark cases resulting into laying down the laws by the High Court, Lucknow Bench, Lucknow, which were reported in various Law Reports.*

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*ACADEMIC ACHIEVEMENTS Awarded "***Social Scientist of the year -1999"** *Award in the field of "LABOUR & SERVICE JURISPRUDENCE " by the National Environment Science Academy, New Delhi in a function Chaired by Hon'ble Mr. Justice H.R. KHANNA , Judge (Rtd.) of the Supreme Court of India, Fellow, National Environmental Science Academy, New Delhi, Fellow, Indian Academy of Social Sciences, Allahabad and Member, U.P. State Legal Aid & Advice Board, Lucknow ( 1984-89 )*

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## Professor (Dr.) USHA TANDON, Chief Editor

**Professor (Dr.) Usha Tandon** is the **Head of Campus Law Centre, University of Delhi**. Her teaching experience spans for a period of 25 years. She served on deputation as Director of a Five Year Law School- Vivekananda Law School, GGS Indraprastha University, Delhi (2005). Her areas of interest include Environmental Law, Gender Justice, Family Law, and Population Law. She has been working, since 1991, on the issues of human development and Population Law with special reference to the human rights of women and right to wholesome environment. Her book on Population Law in India is the only book of its kind which covers various population issues through the perspective of law and has been referred by the American report **"Women of the World: Laws and Policies Affecting their Reproductive Lives- South Asia"** Centre for Reproductive Rights, New York (2004). She has been the Fellow of Max Plank Institute for International and Comparative Law, Hamburg, Germany,(2011); International Institute of Human Rights, Strasbourg, France, (2007) and has to her credit Ciedhu which specializes her for the university human rights teaching. She has the honor of being invited by the Centre for Human Rights and Humanitarian Law, American University Washington College of Law, USA to pursue research on Human Rights and Women's Reproductive Health, (2004). She has also been invited by Korea Environment Cooperation to speak on **"Green India Mission"** in the 6th Policy Consultation Forum of the Seoul Initiative Network on Green Growth: Economic System Economy" in Busan, Republic of Korea,( 2011), organized by Economic and Social Commission of Asia and Pacific (ESCAP) in cooperation with Ministry of Environment of Republic of Korea. Recently, she has been invited by the Royal Court of Bhutan, as a Guest of Honour to participate in the inauguration of new Supreme Court of Bhutan, by Indian Prime Minister in June, 2014.

As an expert from India, she participated at Seoul in an International Symposium on Constitutionalism in Asia organised by the Constitutional Court of Korea (August, 2014). As an expert from India, she also participated in the Kathmandu School of Law, Nepal in the deliberations on the curriculum for **"Human Rights of Women"** (2003). She has 37 research papers to her credit published in the journals of international and national repute. Her published work got applauded by the Supreme Court of India (2003). She has presented papers at International Conferences in various countries including USA, France, Germany, China, Singapore, South Korea, Malaysia and Nepal. She has been supervising research work for LL.M. and PhD scholars and has successfully completed the research projects sanctioned by the University Grants Commission, Delhi and the National Commission for Women, Delhi. She holds professional memberships with Population Association of America, MD, USA; South Asian Law Schools Forum for Human Rights (founder member) Kathmandu; Institute for Constitutional and Parliamentary Studies, New Delhi (life member), All India Law Teachers Congress, New Delhi (founder member); Indian Law Institute, New Delhi (life member) and Indian Society for International Law, New Delhi. **Currently she is the Editor-in-Chief of Journal of the Campus Law Centre and Member, Editorial Board of US-China Law Review.**

## Profile, Mrs. Manisha Verma, **Publication Editor** (Chief Executive)

I am Manisha Verma completed my B.Tech. in Electronics Engireering from Pune University and join as a R&D Engineer in Indian Telephone Industry, developed a system "Power Distribution Automation". This system is designed for handling huge electrical power. There is a need to transport quantum of power efficiently with reliability to the end users. PDA is designed on integrated system concept. It includes control, monitoring and protection of the distribution system. Basically microprocessor and microcontroller based system designed in assembly language MCS-51 family through RF communication and DOS Operating System. After that worked at Cat Vision Ltd. Designed project band trap and channel trap for satellite communications equipment, RF Modem designed HDLC protocols(Half Duplex)high speed data transfer ABM mode using (GMSK) FM Technology.

Then join TCS Ltd. as software engineer as contract basis where assigned a project on Bharat Electronics Limited Ghaziabad where we had to designed and developed **SIMULATOR** for P17 of **Combat Managment System(CMS)** in language C++ and Linux operatng system. P17 is the name of the ship of Indian naval force which lassed with radar, sonar, torpedoes, gun, missiles, aircraft. Basically, simulator was designed for the training, testing and evaluation. Where I have implemented Sig Alarm on event logger on Brahmos missile launcher successfully. Brahmos was the biggest missile launcher which consist 240 missile. Basically Combat Management System (CMS) worked on time share mode concept and facing the problem of signal delay due to timer priority setting and Sig Alarm is not the timer, it was the interrupt which handled the situation without delay.

After finishing my contract in TCS, I started my own software development firm and successfully designed various data base driven management system like Advocate Management System, Society Management System, Form Management System, School Management System on using platform .NET in front end and MS Access in back end on Windows Operating System.

After that suddenly I got opportunity to work with founder and Vice President of NESA, Prof. TRC Sinha for technical support as well as publication editor in NATIONAL PRINTER & PUBLISHER. Actually he wanted to hand over his dream to me in order to get free to leave this world peacefully. As I promised him I started **Academic And Research Publications** with collaboration of JPMS Society, is a Society registered under the Societies Registration Act and its Registration No. is 1649/1986-87. I am also the director of JPM Computer Institute, a company incorporated in 2009 under Company Act 1956. It is an authorised affiliated COMPUTER EDUCATION CEI of RAJEEV GANDHI COMPUTER SAKSHARTA MISSION (R.G.C.S.M.) assigned branch code UP- 240.

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*Subhash Chandra Singh (M.A., LL.M., Ph.D.) is a Professor in the School of Legal Studies, Assam University (A Central University), Silchar. He has a distinctive academic career with more than thirty years of teaching experience in state and central universities. His areas of specialization are Criminal Law and Human Rights. Dr. Singh got the opportunity to visit and lecture in various central law institutions in India. He has authored and edited six books and published more than one hundred articles in different journals of national and international repute.*

*At present, Dr. Singh is Dean, School of Legal Studies, Assam University, Silchar. Before joining Assam University to the post of Professor in 2011 Dr. Singh served Mahatma Gandhi Kashi Vidyapith, Varanasi where he held the position of Head & Dean for many years. He was also the Director, Legal Cell, Mahatma Gandhi Kashi Vidyapith. Dr. Singh has also honoured as chairperson and resource person in conferences, seminars, symposiums and workshops. Dr. Singh is the editor of several journals.*

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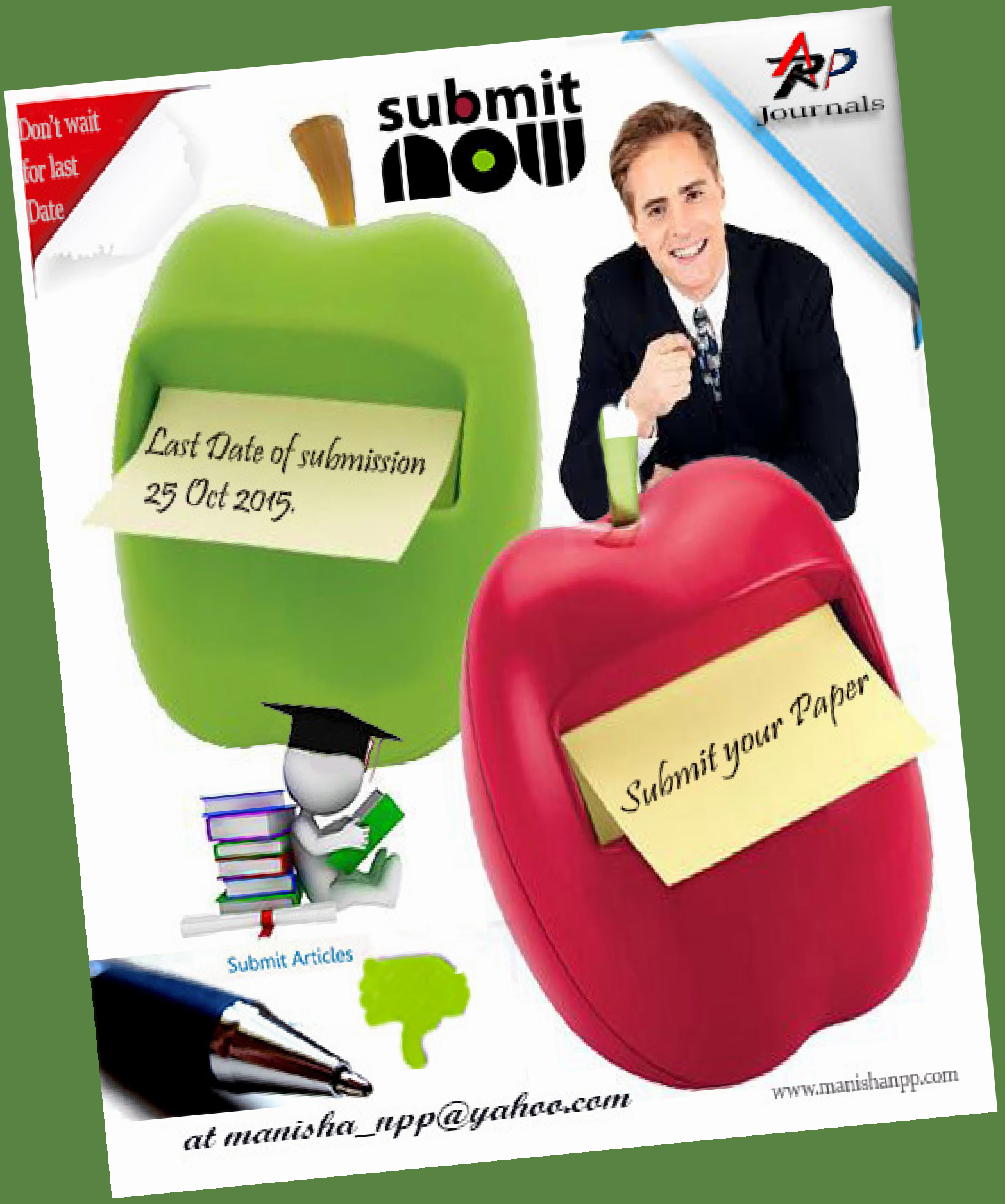
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